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CONFINING JUDICIAL AUTHORITY OVER ADMINISTRATIVE ACTION*

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Modern readers of an article about the relationship between courts and agencies might expect the author to focus on ways to rein in the agency. I do not take that point of view. My experience and study teaches me that the real need is a better understanding of how to rein in the courts. The administrative process is designed for the purpose of efficiently delivering government services to citizens. Since judicial review is an integral part of this design, it is impor-

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tant that courts confine themselves to a function which best serves the intended purposes of the particular administrative program under review. Courts are as responsible as agencies for effective government.

A judicial review system must coordinate judicial and administrative decisionmaking so as to find the best use for each. The present review system seeks to achieve this coordination primarily by following the doctrines of standards of review[1] and unreviewability.[2] These two doctrines incorporate generations of thinking and experience about the role of judicial involvement in administrative action. The doctrines advance congressional consideration of the best use of judicial decisionmakers in the administrative process by instructing courts on their proper role in reviewing a variety of administrative actions. The doctrines guide courts in determining how to contribute to the success of an administrative program.

The strength and success of the administrative process depends on the proper application of these two doctrines. If judges cannot or do not apply the doctrines of standards of review and unreviewability with meticulous care, the judiciary may encroach upon areas reserved for administrative decisionmaking. But many judges reviewing administrative decisions take an extremely cavalier attitude towards application of these doctrines. For example, one of our best judges once wrote: "[W]here there is no question that the agency has acted with procedural impeccability and within the scope of the statutory au-

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1. Standards of review describe the degrees of scrutiny courts use in reviewing agency actions. The standards range from complete scrutiny to very cursory examination. D. ROTHSCHILD & C. KOCH, FUNDAMENTALS OF ADMINISTRATIVE PRACTICE AND PROCEDURE 680 (1981). *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE chs. 29, 30 (1958).

2. The doctrine of unreviewability describes those situations where agency action is not reviewable at all. There is a strong presumption in favor of judicial review of agency actions. *See generally* K. DAVIS, *supra* note 1, ch. 31. A court may review a final agency action unless there is a persuasive reason to believe that Congress intended to preclude judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). While the Administrative Procedure Act, *see* 5 U.S.C. §§ 701-706 (1982), generally favors judicial review, *id.* § 701(a) forbids review in two very limited cases: when review is precluded by statute, and when agency action is committed to agency discretion by law. *See* D. ROTHSCHILD & C. KOCH, *supra* note 1, at 669. A statute must give clear and convincing evidence on its face of intent to withhold judicial review. S. REP. NO. 752, 79th Cong., 1st Sess. 275 (1945). Such intent may also be shown by legislative history. Consumer Fed'n of Am. v. FTC, 515 F.2d 367, 370 (D.C. Cir. 1975). The legislative history of section 702(a)(2) suggests that an agency action is unreviewable only if it is so committed to agency discretion that judicial review is impossible. S. REP. NO. 752, *supra,* at 212. One instance would be where the statute is drawn so broadly that in a given case there is no law to apply. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). Factors such as agency expertise, internal agency policy making, and the necessity for informal agency decisionmaking also have been suggested as occasionally precluding judicial review. *See* Bullard v. Webster, 623 F.2d 1042, 1046 (5th Cir. 1980), *cert. denied,* 451 U.S. 907 (1981); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 377-95 (1968).

thority conferred upon it, judicial review can, if so minded, find great latitude to range widely, no matter how the standard of review is articulated."[3] This attitude is not only lawless, but it ultimately harms the citizens that the courts and the agencies were designed to serve.[4]

A major cause of this cavalier attitude is the inherent myopia of judicial decisionmaking. A judge tends to focus on the particular controversy at hand and the best interests of the individual citizen seeking review of an administrative decision. At the same time, the judge's decision affects all the citizens served by the administrative program. The natural tendency to focus only on the controversy at hand prevents the judge from reconciling the many public values and interests represented by the program. In order to avoid the dangers of this myopia, the judge is supposed to be guided by the standards of review and the doctrine of unreviewability.

The standards of review and the doctrine of unreviewability guide the individual judge in deciding both the individual case and in understanding the case in the context of the whole program and the overall administrative process. Application of these two doctrines assures the court that its limited vision is not leading it to do harm it cannot see.[5] The doctrines express the investigation and intent of Congress as to the best use of the judicial decisionmaker. They pass on the experience and learning expressed by the common law surrounding these doctines. Standards of review and unreviewability primarily

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3. McGowan, Book Review, 74 COLUM. L. REV. 1015, 1021-22 n.14 (1974) (reviewing P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973)); *see also* Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders,* 1969 DUKE L.J. 199 (discussing three major reasons for judicial reversal of agency decisions: unexplained action, unsustainable reason given for action, or inadequate or erroneous findings); Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books,* 75 COLUM. L. REV. 800, 820 (empirical study revealed that judges did not feel limited by standards of judicial review). Justice Frankfurter has accurately described the problem:

> A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope of judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951); *see also* FTC v. Standard Oil Co., 449 U.S. 232, 299 (1980) (Stevens, J., concurring); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 90 (1947) [hereinafter cited as MANUAL].

4. American judges have been less willing than their British counterparts to defer to administrative expertise, particularly in matters of broad social importance. B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT 7 (1972).

5. *Cf.* J. THURBER, *The Admiral on the Wheel,* in LET YOUR MIND ALONE 241 (1937).

serve to control the judiciary, not to allow the judiciary to control the agency. I emphasize that this conclusion derives from the demand of the administrative process that the courts and the agencies coordinate in order to serve the public in the best possible way.

To achieve this coordination, the judiciary must have a clear understanding of how the review system is supposed to work. Many judges are confused about how to integrate the overall purposes of the administrative review process with their decisionmaking in individual cases. In the hope of increasing their understanding of the system, this Article attempts a comprehensive explanation of judicial review of administrative decisions created by the doctrines of standards of review and unreviewability. I first explore the meaning of the several instructions which the system sends to a judge working in a particular administrative program and then explain how a judge can find the applicable instruction in a particular case.

I. THE VARIOUS INSTRUCTIONS

The review system embodied by the two doctrines of standards of review and unreviewability generates several instructions that tell the reviewing court what level of confidence it must have in the agency's decision. The system has developed workable and identifiable distinctions among these instructions.[6] Despite judicial protestation,[7] these instructions can be and are used in practice.

The instructions relate to two major categories of decisions: those involving judgment and those involving discretion. I use the term "judgment" to designate those decisions which can be either right or wrong. "Discretion" is used to encompass decisions which cannot be judged according to any absolute standard and hence are not clearly right or wrong. Review instructions relating to these two categories differ in kind and must be analyzed separately. The review instructions relating to judgment are well developed, though somewhat outdated. Therefore, I will consider that aspect of the system first.

The review system currently uses four distinguishable instructions regarding review of judgment: agreement, reasonableness, arbitrariness, and no review. These instructions tell the court what risk of error the relevant administrative program can tolerate with respect to a particular type of decision. Thus, the instructions tell the court how much confidence it must have that the agency is correct before it can uphold the agency. The instructions form a

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6. I use the term "instruction" to refer to the various levels of judicial scrutiny allowed in reviewing agency actions, *e.g.*, agreement, reasonableness, arbitrariness, and no review. *See* text accompanying note 8 *infra.*

7. Even judges with special competence in administrative law find the standards of review complicated. *See, e.g.*, Leventhal, *Environmental Decisionmaking and the Role of the Courts,* 122 U. PA. L. REV. 509, 540 (1974); Improving the Administrative Process—Time for a New APA?, Panel Discussion Before the National Conference on Federal Regulation (Sept. 28, 1979) (Hon. H. Leventhal) [hereinafter cited as Discussion], *reprinted in* 32 AD. L. REV. 287, 290 (1980).

descending scale; at one end the court is told to demand a relatively high probability that the agency is correct, and at the other end the court is told not to do any testing for error at all.[8]

A. *Agreement or De Novo Review*

The first instruction on this scale tells a court to affirm the agency only if it agrees with the administrative conclusion either as to the entire administrative decision or some part of it; if not, it tells the court to substitute its own judgment. It is often called "*de novo* review" because it tells the court to make its own judgments without in any sense being bound by the administrative conclusion.

On most issues which arise, agreement review is not preferred in the administrative process because it builds in an inefficient redundancy. That is, if the courts are the superior decisionmakers on a particular issue then they should be assigned the sole decisionmaking responsibility, thus circumventing agency decisionmaking. But there are issues where judges are clearly superior to agencies, such as questions of law, that are nonetheless traditionally subjected to agreement review.[9]

Most of the confusion over the agreement instruction revolves around the role of judicial factfinding in reviewing administrative decisions. This confusion is unjustified. An instruction to do agreement review of facts tells the judge, in essence, that a preponderance of evidence must favor the agency's finding of facts if the agency decision is to withstand challenge.[10] Hence, as to facts, agreement review merely expresses a demand for a preponderance of evidence in order to uphold the agency's conclusions.

Although often used for this purpose, the term "*de novo* review" is literally illogical: the court cannot be told both to undertake a *de novo* finding of facts and at the same time remain in a review posture. It is better to think of *de novo* as an instruction to do agreement review on a judicial record dominated by administrative factgathering and factfinding. Since the agency's factual conclusions must be supported by a preponderance of evidence,[11] the

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8. W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 249 (7th ed. 1979); *see also* Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979) (McGowan, J.) (word formulas summon "an attitude of mind in the reveiwing court"); Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference,* 34 FED. B. ASS'N J. 54, 59 (1975) (terming the various standards "mood points").

9. After exploring the meaning of each instruction, I will return in Section III to the question of which issues should be subjected to agreement review.

10. *See* Goodman v. United States, 518 F.2d 505, 511 (5th Cir. 1975).

11. Steadman v. SEC, 450 U.S. 91, 102 (1981). The preponderance of evidence standard is contemplated by the APA, 5 U.S.C. § 555(c) (1982), as well as by traditional civil and administrative proceedings. Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 242-44 (D.C. Cir. 1980). Regulatory reform may ultimately impose a preponderance standard of review in some forms of agency action. *See* Discussion, *supra*

agreement review instruction merely tells the court to test that preponderance. It rarely tells the court to create a redundant record.[12] The phrase "*de novo* review" does not demand a judicial retrial of factual issues or even extensive judicial recordmaking.[13] Rather, the agency record is the focal point. Under agreement review of facts, the administrative record becomes an object of attack along with the agency's final decision. The challenger, like any other plaintiff, must show by a preponderance of evidence that the agency decision is wrong.[14] In doing so, the challenger may introduce into the judicial record other evidence or request new or different inferences from the administative record. This position of the administrative record in the judicial proceeding is unique among the instructions. Thus the term "*de novo*" review tells the court to do agreement review of facts on a judicial record, some or all of which is the original administrative record; agreement as to factual judgments will result when a preponderance does not support the challenger's view of the facts.

Agreement review might apply to any of the issues that make up a complete administrative decision. It is rarely used to review issues of fact, however, and virtually never applied to issues of policy.[15] Agreement review as to these issues has substantial costs that are rarely outweighed by its potential benefits. By its nature, agreement review builds redundancy into an administrative program. Redundancy, however, has both bad and good implications.

On one hand, agreement review creates wasteful inefficiency and misallocation of decisionmaking resources. Remaking the decision has considerable costs, and these costs increase when the second decisionmaker could just as easily have made the decision in the first instance. Not only might agreement review make a competent administrative decision superfluous, but it might replace a superior decision with an inferior one. An agency should be designed with particular types of potential decisions in mind; as to these decisions the

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note 7 (R. Wegman), *reprinted in* 32 AD. L. REV. at 300-01.

12. United States v. First City Nat'l Bank, 386 U.S. 361, 368 (1967):

> It is argued that the use of the word "review" rather than "trial" indicates a more limited scope to judicial action. The words . . . might conceivably be used interchangeably. The critical words seem to us to be "*de novo*" and "issues presented." They mean to us that the Court should make an independent determination of the issues.

The U.S. Code contains 30 sections authorizing *de novo* judicial consideration; 14 refer to "review" and 16 refer to "trial." Only 13 of these 30 sections involve review of administrative action. *See, e.g.*, 33 U.S.C. § 1320f (1976) (authorizes use of agency record in *de novo* proceeding before the district court).

13. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 652-53 (1965).

14. Goodman v. United States, 518 F.2d 505, 507 (5th Cir. 1975); Redmond v. United States, 507 F.2d 1007, 1011 (5th Cir. 1975). "Preponderance" becomes important because the judicial proceeding theoretically ignores the agency decision; the term articulates the weight of information that is necessary to support the agency.

15. Courts reviewing administrative action generally are not authorized to substitute judgment on issues of fact and policy. *See* ASARCO, Inc. v. EPA, 616 F.2d 1153, 1159-60 (9th Cir. 1980).

agency should be the superior decisionmaker.[16] Moreover, the agency usually has the time and machinery for more sophisticated and eclectic decisions. Such advantages are particularly likely to exist with respect to issues of fact and policy.

On the other hand, agreement review polices the administrative decisionmakers more thoroughly than other review instructions. It compels strong checks, useful reanalysis, and administrative introspection. It might also have advantages in situations where a second decisionmaker with a new perspective can substantially improve the results of the first decisionmaker. The reviewing court will have the benefit of the administrative decision and can improve that decision from a position of objectivity. In addition, the prospect of agreement review may make the agency more careful in its decisions because it faces the prospect that it may have to prove it is right. Thus, there is nothing inherently wrong with agreement review, and the review system must contain such an instruction.

The current judicial review system would be improved, however, by a more sophisticated use of the agreement instruction. The instruction should only be used where the costs of use are outweighed by the benefits. Costs attributable to duplication, and the commitment of judicial resources, are considerable, and inhibit a program's ability to deliver intended services. Agreement review should only be prescribed where the advantages of redundancy outweigh these costs. Congress should carefully weigh these factors before it incorporates agreement review into an administrative program. Courts, on the other hand, should not infer such authority unless it is expressly granted, and they should limit the exercise of expressed authority to those parts of the decision for which it was clearly intended.

The common law principles surrounding agreement or *de novo* review guard against unnecessary costs through the concepts of deference and presumption of regularity. Even where agreement review is prescribed, the law requires the reviewing court to give deference to agency decisionmaking.[17] The law also requires the court to start from the presumption that the agency made the correct decision.[18] Thus, although the other review instructions bind a court to the agency's judgment unless it is unreasonable or arbitrary, agreement review, while not going that far, still demands that the court give the agency's decision due respect and presumption of regularity.

In performing agreement review, the court may uphold the agency only where it finds after reviewing the administrative record, and any supplemental judicial record, that the agency is correct. When the instruction covers factual

16. *See* W. GELLHORN, WHEN AMERICANS COMPLAIN vii, 1-2 (1966). Nonetheless, the forces on agency action support independent supervision. *See* Posner, *Natural Monopoly and Its Regulation,* 21 STAN. L. REV. 548, 624-25 (1969).

17. *See* Matthews v. Eldridge, 424 U.S. 319, 349 (1976).

18. *See* Power Reactor Dev. Co. v. International Union of Elec. Workers, 367 U.S. 396, 408 (1961).

issues, it will affirm the agency's conclusions only where a preponderance of its record supports the agency. In order to guard against unnecessary costs, a court will usually afford the agency decision both deference and a presumption of regularity.[19] In short, a court applying this instruction is under a duty to give deference or respect, but it is in no way bound by the agency's judgment.

B. *Reasonableness*

Reasonableness review differs fundamentally from agreement review because, in contrast, it binds the court to the agency's conclusion unless the court finds the conclusion to be unreasonable. Reasonableness review instructs the court that it need not delve so deeply into the agency's judgment so as to assure that the conclusion is correct; it tells the court to assure that there is a relatively high probability that the agency is correct. The reasonableness instruction, then, tells the court to tolerate some risk of error (error being a conclusion other than the one the court would have reached).

Reasonableness review expresses the attitude or mood with which a judge must approach a particular administrative decision. Whereas agreement review expresses a mood of judicial superiority, "reasonableness" instructs a court to approach its function with much less confidence. The reasonableness instruction tells the court that it is not to decide whether the agency found the one right answer—the answer the judge would have given—or even to determine how close the agency came to the one right answer. It requires only that the court decide whether the agency has found an answer which *might be* correct. The court's function then ends and it is the agency's judgment, not the court's, which is controlling. Thus, the court must find that the decision demonstrates sound judgment—not necessarily correct judgment. Sound judgment, however, is a fairly sturdy standard, and the mere chance that the agency's judgment is correct is not enough. Reasonableness review demands that the probability that the agency is correct be relatively high.

The reasonableness instruction is often expressed by the term "substantial evidence." This word formula has been defined in many ways,[20] but it generally generates reasonableness review. The basic substantial evidence standard was well established long before the enactment of the Administrative Procedure Act (APA), which did little more than codify existing practice.[21] Before the APA, the phrase had already acquired the meaning of reasonableness. The

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19. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

20. A Lexis search found 21,326 federal cases using "substantial evidence," 11,153 cases controlling for administrative related opinions since the passage of the APA. Many of these cases have cited at least one of the classic opinions discussed above. The conclusions of this Article are based on cases in this survey, especially the opinions of judges known for their expertise in administrative law.

21. 5 U.S.C. § 706(a)(1)(E) (1982); *see also* MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 5-116(c)(7) (1981), 14 U.L.A. 156 (Supp. 1984) (substantial evidence standard).

Supreme Court in an early leading case said that substantial evidence "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[22] In order to meet this test, the Supreme Court has required "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[23] This support is something less than weight or preponderance of the evidence.[24] While some have offered other definitions,[25] reasonableness seems to sum up the law and proves to be the most pervasive and useful guide to substantial evidence review.[26]

Reasonableness review is appropriate any time an administrative program requires a high probability of correctness, but it cannot tolerate judicial duplication of administrative decisionmaking. This combination traditionally exists when the decision is made through a formal, trial-like proceeding.[27] The dominant issues in such proceedings tend to be specific or adjudication facts; such facts can be proven and can be evaluated under a very high correctness standard. The system cannot tolerate a very high risk of error on such issues, yet it gains little from having a court duplicate the agency decisionmaking. Thus, the APA provides for reasonableness review—the substantial evidence standard—only where an administrative decision must be made through the trial-type procedures of formal adjudication or formal rulemaking.[28]

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22. NLRB v. Columbia Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

23. Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). *Consolidated,* decided before the APA was passed, stated that substantial evidence is "more than a scintilla." 305 U.S. at 229. This phrase suggests the "some evidence" approach rejected by the APA drafter's "whole record" requirement. *See* MANUAL, *supra* note 3, at 110.

24. Consolo v. FMC, 383 U.S. 607, 620 (1966).

25. *E.g.,* Jaffe, *Judicial Review: Substantial Evidence on the Whole Record,* 64 HARV. L. REV. 1233, 1239 (1951):

> [U]nderlying the vexed word "substantial" is the notion or sense of fairness. . . . [T]his seems to me to give it a closer linquistic connection with the notion of conscientiousness. The word "substantial," coming as it does from a spectrum of words such as "scintilla," "preponderance" and "weight," connotes the mechanics of judging. The concept of fairness relates to the attitude of judging. [T]he judge may—indeed must—reverse if as he conscientiously sees it the finding is not fairly supported by the record; or to phrase it more sharply, the judge must reverse if he cannot conscientiously escape the conclusion that the finding is unfair.

This standard of unfairness seems incorrect because it substitutes judicial discretion for administrative discretion. Thus, it is more intrusive than a substitution of judicial judgment. While a court may review administrative judgment and sometimes even substitute its judgment, it should not substitute discretion. *See* section III *infra.*

26. In Universal Camera Co. v. NLRB, 340 U.S. 474 (1951), the seminal post-APA case, Justice Frankfurter indisputably established the reasonableness notion for applying the substantial evidence standard, and reaffirmed the understanding that the APA requires whole record review rather than review for evidence somewhere in the record. *Id.* at 488-90; *see* S. DOC. NO. 248, 79th Cong., 2d Sess. 214, 279 (1946).

27. *See* text accompanying note 165 *infra.*

28. 5 U.S.C. § 706(2)(E) (1982); *see id.* §§ 556-557.

The reasonableness instruction may be appropriate for issues or entire decisions resolved in informal adjudication.[29] If a court sees reasonableness review as a message to demand a relatively high probability of correctness then it can, as we shall see in section III, apply the instruction without regard to the context in which the agency made the decision. This flexibility is important because substantial evidence review has recently been demanded in decisions made through informal procedures. Such instruction has resulted in confusion over whether "evidence" is required to meet the test. If evidence is required, then the informality of the decisionmaking decreases the likelihood of withstanding judicial scrutiny. It is clear, however, that use of the term "substantial evidence" is an effort to raise the level of judicial scrutiny, and not to define the decisionmaking process. Any confusion could be alleviated by using the non-record-laden term, "reasonableness." A simple instruction to do reasonableness review would better express the intended relationship between the courts and the agency in an administrative program. In this way, as I discuss in section III, this higher review might be applied to any kind of issue decided through any form of procedure.

Much of the meaning of the reasonableness instruction derives from experience and commentary on the application of the substantial evidence test. Again, however, very little flexibility is required to transfer this learning to cases involving reasonableness review of nonformal proceedings; cases reviewing for substantial evidence in a trial-like proceeding can be used to guide review for reasonableness in nontrial-like proceedings.

Because substantial evidence review is traditionally applied to trial-like records, it has naturally been contrasted with the clearly erroneous standard. Appellate courts routinely apply the clearly erroneous standard to factual conclusions of trial courts. Many believe the standard is appropriate for review of agency decisions made through trial-like procedures,[30] but it is not so used. The classic formulation of the clearly erroneous standard is expressed in *United States v. Gypsum Co.*[31]:

> Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous."
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> The practice in equity prior to the present Rules of Civil Procedure was

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29. "The term 'informal adjudication' has no commonly accepted meaning. . . . [I]t broadly refers to administrative decisions that are not governed by statutory procedures, but which nevertheless affect an individual's rights, obligations, or opportunities." Verkuil, *A Study of Informal Adjudiciation Procedures,* 43 U. CHI. L. REV. 739, 739 n.1 (1976).

30. *Compare* MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 5-116(c)(7) (1981), 14 U.L.A. 156 (Supp. 1984) *with* MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 15(g)(5) (1961), 14 U.L.A. 431 (1980)(the new Act uses the substantial evidence test, whereas the old Act used the clearly erroneous standard).

31. 333 U.S. 364 (1947).

> that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.[32]

As explained in *Gypsum,* the clearly erroneous standard instructs the reviewing authority to assure that the inferior authority has not made a mistake, *i.e.,* that it has found the correct answer.

The clearly erroneous standard and the *de novo* standard are similar because they both require some degree of agreement. Both instruct the reviewing authority to assure that the inferior authority has found the one right answer. They differ only in the level of confidence the superior authority must have that the inferior authority has the right answer. In the strong form of agreement review, expressed most often by the *de novo* standard, the review authority can decide that a mistake was made where a preponderance of evidence did not support the inferior authority's conclusions. In the weak form of agreement, expressed by the clearly erroneous standard, the review authority would have to find that the mistake was clear on the inferior authority's record.

Thus, these two terms express essentially the same judicial attitude. They differ in the extent to which the review authority may look beyond the inferior authority's record and, more importantly, in the degree of persuasion it should require. *De novo* review requires that the court be persuaded that the inferior authority is correct, whereas the word "clearly" suggests a fairly strong presumption in favor of the inferior authority. Hence, the review authority cannot reject the inferior authority's conclusions merely on a finding that there is more support for the conclusion that a mistake was made. The review authority must uphold the inferior authority under the clearly erroneous standard unless it is affirmatively convinced that a mistake has been made.[33] Thus, if clearly erroneous review were applied to judicial review of agency action, the review system would have two types of agreement review instruction: a strong and a weak agreement review.

The present administrative review system does not use the clearly erroneous standard/weak form of agreement review. Either the court is instructed to rely on its own record, perhaps dominated by the agency's record, and reverse unless the agency has found the right answer, or it is instructed to rely on the agency's record and assure that the agency has found an answer which might be correct. The absence of a "clearly erroneous" standard from the present system means that a reviewing court cannot be told to use the agency's record and uphold the agency unless it is convinced that the agency has not found the right answer.[34] Moreover, the strong form of agreement review is rarely pre-

32. *Id.* at 395 (footnotes omitted).
33. *See* L. JAFFE, *supra* note 13, at 572.
34. I illustrate the difference between "clearly erroneous" and "substantial evi-

scribed. As discussed above, agreement review in any form is not preferred in the administrative process and it plays only a small part in the judicial review system.

Some have argued, however, that the clearly erroneous standard should be used instead of the substantial evidence or reasonableness standard.[35] These people are not confident in administrative decisionmakers and want a more active judiciary in the administrative process. The weak form of agreement review established by the clearly erroneous test comports with their view of the proper relationship between the courts and the agencies. Although some have doubted the practical difference between the two,[36] others have recognized that the difference runs to the foundation of the judiciary's role in the administrative process.[37] Those who debate over the imposition of the clearly erroneous standard understand that it assigns to the courts a very active role in administrative decisionmaking. They see that, whereas reasonableness review limits the judicial role to assuring that the agency has stayed within some rather broad boundaries, the clearly erroneous standard forces the courts to take an active part in the administrative process. Advocates of the weak form of agreement review, therefore, want the judiciary to have affirmative decisionmaking duties and not merely monitor the agency's decisionmaking.[38] They prefer the clearly erroneous standard over the stronger form of agreement review because it affords the agency's decision a stronger presumption of correctness, and judicial judgment can be made on the administrative record without any argument that a judicial record is needed.

Opponents of the weak form of agreement review see advantage in leaving the actual decisionmaking in the hands of the agency under the supervision of the courts and see the monitoring role as more consistent with the concept of an administrative process. They see the hierarchical relationship between courts in the judicial process as fundamentally different from the relationship between courts and agencies. Agencies are distinct entities in their own system, and while courts should monitor their conduct, they should not stand as a superior authority in the same way that appellate courts stand to lower courts. To them, the pervasive establishment of an active role for the judiciary in the

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dence" for my students through the following question. "If a professor says that he expects the 'right' answer in an examination, has he required more than if he says he will give full credit for a 'reasonable' answer, even if it is not the correct one?"

35. B. SCHWARTZ, ADMINISTRATIVE LAW 600 (1976); Special Committee on Legal Services and Procedures, ABA, Report to the Midyear Meeting of the House of Delegates 31-32 (1956).

36. S. DOC. NO. 8, 77th Cong., 1st Sess. 92 (1941); L. JAFFEE, *supra* note 13, at 92.

37. 4 K. DAVIS, *supra* note 1, at 124-25; B. SCHWARTZ, *supra* note 35, at 596.

38. In challenging an agency's judgment, the clearly erroneous standard (the agency was incorrect) at first seems to be more difficult to overcome than a reasonableness standard (the agency was unreasonable). This attitude ignores the nature of the judicial function, which focuses on the adequacy of the agency action rather than the adequacy of the challenge.

administrative process would injure the integrity of both systems and detract from the advantages of using administrative decisionmaking in the first place. This view has prevailed, and the clearly erroneous standard is not used in the administrative process.

The system thus has a sharp break between the active role conveyed by strong agreement review and the monitoring role conveyed by reasonableness review. The system has not accepted a weak agreement review, expressed as clearly erroneous, either as a substitute for reasonableness review or as an intermediary instruction. Indeed, the system has generally rejected any form of agreement review on most issues as inconsistent with the relationship between the courts and the agencies in the administrative process. In sum, reasonableness is one of the most pervasive instructions in the administrative process.[39] Reasonableness, although not a search for the one correct answer, does instruct the judge to assure that there is a relatively high probability that the agency's judgment is correct; it is tolerant of some risk of error but demands a relatively critical attitude on the part of the reviewing court.

C. *Arbitrariness*

The review system must provide for administrative decisions which are by nature incapable of standing up to a very critical judicial attitude. As to such decisions, it must tolerate a fairly high risk of error or the decisions could never pass judicial scrutiny. For this reason, the system has developed the "arbitrary or capricious" standard, or simply arbitrariness.[40] Arbitrariness review is similar in some ways to reasonableness review. Both tell the court to monitor the agency for probability of correctness. They differ, however, in the degree of judicial scrutiny; the arbitrariness instruction tests for a much lower probability of correctness and builds into an administrative program a greater tolerance for error.

Beyond its contrast with reasonableness review, there is no clear meaning for arbitrariness review. Courts have tried on occasion to articulate some formulation for the arbitrariness standard. Since 1971, courts have looked to the Supreme Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*[41] for guidance in the application of the arbitrariness standard. *Overton Park* involved an informal adjudication by the Secretary of Transportation to free federal funds for the construction of a highway through Overton Park in Memphis, Tennessee. Under section 4(f) of the Department of Transportation

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39. *See* 4 K. DAVIS, *supra* note 1, at 114.

40. 5 U.S.C. § 706(2)(a) (1982) authorizes three separate types of review: arbitrary or capricious; abuse of discretion; and not in accordance with law. Capriciousness seems to be a lesser included element of arbitrariness, or action made arbitrary because it is based solely on whim. Abuse of discretion refers not to review of true discretion, but weak review of judgments and thus often mirrors review for arbitrariness. Review of law is distinct. *See* section III *infra.*

41. 401 U.S. 402 (1971).

Act[42] and section 138 of the Federal-Aid Highway Act,[43] the Secretary of Transportation could not authorize use of federal funds to finance construction of highways through public parks if a "feasible and prudent" alternative route existed.[44] The petitioners, Citizens to Preserve Overton Park, contended that the Secretary violated these statutes by authorizing a six-lane interstate highway through the park.

After the Court found the action reviewable, it then had to prescribe the appropriate standard of review for such informal decisionmaking procedures. The Court found no compelling need for independent judicial factfinding and thus no cause to require *de novo* review.[45] It then held that the absence of a formal hearing requirement eliminated a requirement of substantial evidence review.[46] Although neither strict standard applied, the Court determined that "the generally applicable standard of [APA] § 706 requires the reviewing court to engage in a substantial inquiry" and the presumption of regularity "is not to shield [the Secretary's] action from a thorough, probing, in-depth review."[47] Nonetheless, within this "substantial inquiry," if the official acted within his authority, then the court is to ensure against only arbitrariness. "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although the inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one."[48]

Although this formulation of the arbitrariness instruction is often cited, it is hardly useful. Indeed, if taken literally, it is simply wrong. In the first place, courts applying this formulation tend to ignore all but the mandate to conduct a searching and careful inquiry; they slip into a more active role than was intended for arbitrariness review. They tend to forget the counterpoise admonishment in the Supreme Court's formulation that the standard is a narrow one. Whereas under the arbitrariness instruction the reviewing court is to inquire closely into the administrative record and the circumstances surrounding the decision, the court must measure the decision itself under a standard which allows the court to reverse only if it finds that the risk of error is extremely

42. 49 U.S.C. § 1653(f) (1976).
43. 23 U.S.C. § 138 (1982).
44. 401 U.S. at 411.
45. *Id.* at 414.
46. *Id.* at 414-15. In dicta, the Court stated that rulemaking covered by 5 U.S.C. § 553 (1982) is subject to review for substantial evidence. 401 U.S. at 417. The Court either erred in reading the APA, or it was referring to the formal rulemaking requirement incorporated by reference in § 553. Section 553 refers to §§ 556-557 for "on the record" or formal rulemaking. 5 U.S.C. § 706 (1982) prescribes substantial evidence review for formal rulemaking. *See* National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 700-01 (2d Cir.), *cert. denied,* 423 U.S. 827 (1975). *But see* Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard,* 84 YALE L.J. 1750, 1756-58 (1975).
47. 401 U.S. at 415.
48. *Id.* at 416.

high. The Supreme Court's formulation, however, leads courts to undertake an in-depth inquiry and to evaluate the decision very critically. The first is essential, but the second is totally incompatible with the logic of the review system.

The Court contributed further to the confusion by telling courts to measure the decision for "clear error of judgment."[49] This tells the reviewing court to look for mistake instead of measuring the risk of error; it incorporates agreement review into the arbitrariness standard. The *Overton Park* Court's formulation would require a court doing arbitrariness review to evaluate the administrative decision under the same standard as would be required by the clearly erroneous standard; the court would reverse if it was affirmatively convinced that an error had been made.

The Court in *Overton Park* seemed to recognize that the arbitrariness instruction establishes a much less active judicial role, but its choice of words misdirects courts toward the more active participation engendered by agreement review. As a matter of fact, the case was a prime example of when a court should not hold an agency's decision to a very high probability of correctness. Any judgment on what is "feasible and prudent" must be, by its nature, very flimsy. Were a court to do more than arbitrariness review it would almost inevitably replace the administrative decisionmaker. Since these are the judgments that agencies were created to make, substituting judicial decisions would divert the decisionmaking authority into the hands of the wrong institution. For such decisions the courts must carefully remain a tolerant monitor, because the arbitrariness instruction dictates and communicates restraint. By encouraging courts to stray beyond this role, the Supreme Court's decision in *Overton Park* has added confusion, not clarity, to the review system.[50]

Refinement of the "arbitrariness" standard has not succeeded because the word itself carries all the meaning needed. The word emerged through the evolution of administrative law principles and was adopted by the APA drafters.[51] It has not been improved upon and, in fact, efforts such as *Overton Park* have, to varying extents, detracted from the system's ability to communicate.

The meaning of the arbitrariness standard starts with an understanding of the term in ordinary usage. In ordinary speech, "arbitrary" is used differently from "unreasonable." As Professor Jaffe has suggested, reasonableness con-

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49. *Id.; see* Wright, *The Courts and Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375, 392 n.84 (1974).

50. It has been suggested that *Overton Park* sought to consolidate arbitrariness review with review for constitutionality, jurisdiction, and procedure. Natural Resources Defense Council v. NRC, 685 F.2d 459, 481 (D.C. Cir. 1982) (Wilkey, J., dissenting), *rev'd sub nom.* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983). Although this observation makes more sense than what *Overton Park* held, it is not supported by the opinion or sound judicial policy. Because each of these categories raises a different level of review, they must be separated as they appear in administrative decisions. *See* section III *infra.*

51. 5 U.S.C. § 706(2)(A) (1982).

notes the operation of a reasoning mind.[52] Hence, unreasonableness is a result that cannot be the product of a reasoning mind. For a decision to fail this test, it must compel an *affirmative* conclusion that the decision could not be the product of a valid reasoning process. This allows for a variety of possible answers, but requires that each alternative must be clearly within the boundaries of sound judgment. Arbitrariness, on the other hand, sets a much lower threshold. It conveys the sense that the decision is totally intolerable; it rejects only those decisions that are outside any conceivable rationale alternative. I suggest that an arbitrary decision would be one expected of a psychotic, a despot, a primitive, or the like. Evaluating the decision in this way demands much less critical depth than measuring it against the product of a reasoning mind. In somewhat more concrete terms, the difference is one of measuring the probability of error. Arbitrariness demands a much lower probability that the administrative judgment is correct than either reasonableness or agreement review.[53]

The ordinary meaning of "arbitrary" conveys the lower critical evaluation demanded of the reviewing court and the sense that the court should be very tolerant unless the judgment is beyond all boundaries of acceptability. A court which does not recognize the difference between this instruction and others denies those subtle distinctions that allow for sophisticated communication.

While it is useless to try to quantify the arbitrariness standard,[54] a review of the cases suggests that the courts, despite their protests, understand the nature of the instruction.[55] While judges do not attempt to articulate the amount of certainty that will convince them to uphold the agency, they have, on several occasions, tried to identify facts upon which they make their judgments. For example, Judge McGowan said:

> In short, the concept of "arbitrary and capricious" review defies generalized application and demands, instead, close attention to the nature of the particular problem faced by the agency. The stringency of our review, in a given case, depends upon analysis of a number of factors, including the intent of Congress, as expressed in the relevant statutes, particularly the agency's enabling statute; the needs, expertise, and impartiality of the agency as regards the issue presented; and the ability of the court effectively to evaluate the

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52. L. JAFFE, *supra* note 13, at 596.

53. To bring this difference home to my students, I continue the question begun in note 33 *supra*. "If the professor says he will give full credit on an examination for answers that are not arbitrary as well as those that are reasonable and correct, would you feel more confident on test day?"

54. *Cf.* A. FLEW, THINKING ABOUT THINKING 104 (1975) ("As Edmund Burke once said, with his usual good sense, 'Though no man can draw a stroke between the confines of night and day, still light and darkness are on the whole tolerably distinguishable.' ").

55. A Lexis search revealed 6,764 federal cases using the phrase "arbitrary or capricious." The generalization about this standard depends on a survey of these cases, especially those decided recently and by judges known for their administrative law expertise.

question posed.[56]

Courts are particularly prone to find a lack of consistency as evidence of arbitrariness.[57] In particular, it is often held that an *unexplained* change in policy is arbitrary.[58] Courts are also sensitive to a failure to demonstrate consideration of all significant alternatives.[59] Indeed, evidence that the agency might have ignored facts, or did not make a good faith effort to gather or consider significant information, may lead to a finding of arbitrariness.[60] "Before administrative action will be set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case."[61]

The way the agency goes about gathering the facts may also be considered arbitrary. Improper methodology and test procedures, for example, have been held to create evidence of arbitrary agency factfinding.[62] Not only will ignoring facts cause problems, but failure to make use of experience or to conduct necessary tests or experiments might also rise to the level of arbitrariness.[63] In each of these efforts to apply the arbitrariness instruction, the court shows the proper cautiousness towards its own function and looks at factors which raise an intolerable risk of error. One can glean from these factors, as well as from direct statements, that reviewing courts do in fact understand not only the nature of arbitrariness review but also the level of judicial scrutiny authorized by instructions to undertake such review.

In 1983, the Supreme Court decided two cases that will have a lasting impact on the scope and interpretation of the arbitrariness standard: *Balti-*

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56. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1050 (D.C. Cir. 1979).

57. *See* Catholic Medical Center v. NLRB, 589 F.2d 1166, 1174 (2d Cir. 1978).

58. *See, e.g.,* Local No. 777 v. NLRB, 603 F.2d 862, 882 (D.C. Cir. 1978).

59. Although there need be no evidence that the agency considered *all* possible choices, failure to adequately consider all significant alternatives may make the agency action arbitrary. National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095, 1112-13 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 926 (1978).

60. In military personnel decisions, for example, "[t]he touchstone often used is whether the decision had any 'basis in fact.' " Nicholson v. Brown, 599 F.2d 639, 646 (5th Cir. 1979). "A searching and careful inquiry" might determine whether there was "a rational connection between the facts found and the choice made." Seatrain Int'l v. FMC, 598 F.2d 289, 292-93 (D.C. Cir. 1979). Under an arbitrary or capriciousness standard, the court must determine whether the agency "properly identified the opposing interests in light of the facts of record, and rationally balanced them against each other." Food Mktg. Inst. v. ICC, 587 F.2d 1285, 1291 (D.C. Cir. 1978).

61. Coleman v. Darden, 595 F.2d 533, 539 (10th Cir.), *cert. denied,* 444 U.S. 927 (1979). Not every "reasoned" decision, however, will pass the test.

62. *See* South Terminal Corp. v. EPA, 504 F.2d 646, 662, 665 (1st Cir. 1974).

63. *See* ITT-World Communications, Inc. v. FCC, 595 F.2d 897, 909-10 (2d Cir. 1979); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 250 (2d Cir. 1977). Experimental regulation, however, should be encouraged and not labeled as arbitrary *per se.*

more Gas & Electric Co. v. Natural Resources Defense Council, Inc. (Vermont Yankee II)[64] and *Motor Vehicle Manufacturers Association, Inc. v. State Farm Mutual Automobile Insurance Co.*[65] It is useful to contrast these two cases because the former did not find arbitrariness in the agency's action, but the latter did. More interestingly, while affirming the D.C. Circuit's finding of arbitrariness in the *Motor Vehicle* case, the Court took pains to instruct the circuit court on its errors in the use of that standard.

Baltimore Gas involved substantive review of a nuclear waste rule that was found to pass procedural muster in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.*[66] The controversy revolved around a table promulgated by the NRC that purported to evaluate the environmental effects of a nuclear power plant's fuel cycle. A public interest organization contended that the NRC did not have sufficient basis for using a "zero-release assumption," *i.e.,* that solidified waste would not escape and harm the environment once a waste repository was sealed. After taking the now traditional swipe at the D.C. Circuit,[67] the Court explained that the mere absence of certainty did not necessarily make the agency action arbitrary. In this situation, the NRC recognized the inherent uncertainty in such determination and tried to control it in several ways. First, it carefully limited the purpose of the zero-release assumption to individual license decisions under current technology. Second, the zero-release item in the table constitutes only one of several factors which go into individual decisions, and the table as a whole is consciously conservative and "risk averse."[68] Third, the Court said "a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[69] The Court noted the tremendous volume of information and study supporting the agency's choice, and the Commission strongly expressed commitment to risk averseness. It also noted the absence of evidence that health or other considerations had ever been ignored by the NRC.

> In sum, we think that the zero-release assumption—a policy judgment concerning one line in a conservative Table designed for the limited purpose of individual licensing decisions—is within the bounds of reasoned decisionmaking. It is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission

64. 103 S. Ct. 2246 (1983).
65. 103 S. Ct. 2856 (1983).
66. 435 U.S. 519 (1978); *see* notes 270-74 and accompanying text *infra.*
67. 103 S. Ct. at 2256. No more, however, than that of one of the circuit's own judges who wrote in dissent: "If there was ever a doubt prior to today, it is now clear that this court is committed to an assumed role as high public protector of all that is good from perceived evils of the nuclear age." Natural Resources Defense Council v. NRC, 685 F.2d at 517 (Wilkey, J., dissenting).
68. 103 S. Ct. at 2255.
69. *Id.* at 2256.

has considered the relevant factors and articulated a rational connection between the facts found and the choice made.[70]

In contrast, the Supreme Court agreed with the D.C. Circuit's finding of arbitrariness in the airbag case, *Motor Vehicle Manufacturers Association.* This case arose from the Reagan Administration's decision to reverse the long regulatory evolution towards mandatory passive restraint systems (automatic seat belts and airbags) in automobiles. After a period of comments and public hearings, the Secretary of Transportation, through the National Highway Traffic Safety Administration (NHTSA), rescinded the passive restraint requirement. The D.C. Circuit found that the decision to rescind was arbitrary,[71] and the Supreme Court affirmed.[72] Nonetheless, the Supreme Court took pains to point out that the Circuit's "path of analysis was misguided and the inferences it produced are questionable."[73]

The Court disagreed with the Circuit's efforts to heighten the standard of review by reference to subsequent congressional action; failure of Congress to veto the prior rule did not in the Court's mind indicate that rescission of that rule must be tested under a higher standard. The Court did not find, as did the circuit court, that "the most troublesome question" in the case was the standard of review. Instead, it found that the "arbitrary or capricious" standard was clearly indicated by the fact that the agency action was informal rulemaking.[74]

The Court then determined how to apply the non-heightened arbitrariness standard. The Court found that the recision was arbitrary because the NHTSA failed to consider clearly viable alternatives. First, the Court could not accept the NHTSA's conclusion that airbags would not be valuable because the other type of passive restraints, automatic seatbelts, would be detached by consumers. The Court found no justification for not requiring, in that case, airbags only. The full record of the rulemaking proceeding demonstrated the value of airbags. The agency did not explain at the time why it did not adopt these rather obvious alternatives.[75]

Furthermore, the Court could not find sufficient justification for the conclusion that automatic seatbelts must be made so they can be disconnected by consumers. It conceded that the need for detachable seatbelts and the probability that consumers would detach the belts were the type of matters which should be left to the expertise of the agency, but if found that the agency had not brought its expertise to bear on the question. "By failing to analyze the continuous seatbelts in its own right, the agency has failed to offer

70. *Id.* at 2257.
71. 680 F.2d 206, 242 (D.C. Cir. 1982), *aff'd,* 103 S. Ct. 2865 (1983).
72. 103 S. Ct. at 2865.
73. *Id.* at 2867.
74. *Id.* at 2865.
75. *Id.* at 2869. The Court refused to accept post hoc explanation by the appellate court. *Id.* at 2870 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard."[76]

The airbag case is a perfect example of the arbitrariness standard in action. The Court clearly recognized the demand for judicial restraint inherent in this test, but this restraint did not prevent the Court from smelling the bad air around this administrative decision. In contrast, the NRC in *Baltimore Gas* had done all that could be done in promulgating the fuel-cycle rule; it tried to make a very controlled and conservative decision. The Court upheld this decision even though the agency itself recognized some probability of error. The contrast between the cases is brought to light by the different treatments of uncertainty. In the fuel cycle case, the Court almost applauded the agency's admission of uncertainty; it was clearly impressed by the agency's efforts to deal rationally with the unknowable. In the airbag case, on the other hand, the Court did not permit the uncertainty of the benefits of passive restraint to justify a refusal to regulate. The agency there had not done as much as it could have, and it had not made the best of the information that was available. An agency, the Court held, could revoke a regulation on the basis of serious uncertainty, but only "if supported by the record and reasonably explained."[77] Neither element was present in the airbag case. In sum, even in an atmosphere of considerable restraint, a court can recognize when it must step in: when the agency has passed the boundary into arbitrariness.

Because arbitrariness review necessarily focuses on adequate development of information, courts slide into a review focusing on the adequacy of the agency's information gathering procedure rather than on the substantive decision itself. This tendency is apparent in application of each review instruction, but it tends to dominate arbitrariness review both because the instruction is less understood and because the decisions are made on a greater variety of procedures. Here even more than the others, however, the court must focus on the difference between substantive and procedural review.

As discussed in section III, a court's authority over procedure is superior to the agency's; it must do agreement review of procedural issues.[78] By confusing substantive review of a decision with the process for gaining support for that decision, courts, in an effort to follow the arbitrariness standard, often give the procedural question much less review than they should. Of the two, however, substantive review suffers most from this shift in emphasis. By shifting emphasis, the court evades its responsibility to test the substantive decision. A court must meticulously separate its procedural review from its substantive review. A failure to do so may result in inadequate review of either or both the substantive and procedural elements of the decision.

One effort to reconcile all the factors which contribute to arbitrariness

76. *Id.* at 2873.
77. *Id.* at 2871.
78. *See* notes 268-80 and accompanying text *infra.*

review is Judge Leventhal's "hard look" doctrine.[79] That doctrine focuses the inquiry on the agency. The reviewing court acts as a supervisor to assure that the *agency* has done its job. A court would overturn an agency decision only "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decisionmaking."[80] This was the review the Supreme Court conducted in *Motor Vehicle Manufacturers.*[81] Certainly, in many cases, assurance that the agency acted with diligence, as in *Baltimore Gas,* will guard against arbitrariness. A court should start with this question. It should not, however, ignore other "danger signals" pointing to the kind of high risk of error associated with arbitrariness.[82]

In undertaking arbitrariness review, it is also essential that a court distinguish arbitrariness review from review of discretion. Although the two are often combined, they are in fact quite different. Arbitrariness demands a weak review of judgments relating to questions that have right and wrong answers. Review of true discretion, on the other hand, involves an entirely different variety of decision, a group of decisions which will be dealt with in the next section.[83] Confusion enters the review system when Congress or the common law, in an attempt to prescribe weak review, uses phrases containing the word discretion, such as "abuse of discretion" or "in excess of discretion." Decisions covered by these instructions involve judgment, not true discretion, and such review might better be communicated by the arbitrariness standard.[84]

Dworkin notes that we often refer to some forms of judgment as discretion.[85] For example, we might say that the rules of evidence give the judge discretion, but in fact they do not give true discretion because they require compliance with some standards (for Dworkin they confer a weak form of discretion).[86] In this sense of discretion, we really mean unreviewable—the decisionmaker exercises the ultimate judgment. Unreviewable decisions, however, are not necessarily the exercise of true discretion. Understanding of true discretion requires the extensive analysis attempted in the next section.

In recognizing the true nature of instructions using the term "discretion,"

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79. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971); *see* Leventhal, *supra* note 7, at 511.

80. 444 F.2d at 851.

81. *See* text accompanying notes 73-75 *supra.*

82. Some courts have perverted this notion by reading it to mean that the court should take its own "hard look," and not just assure that the agency has. *See* National Lime Ass'n v. EPA, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (describing the evolution of this misconception). This interpretation is either nonsense or it is wrong.

83. *See* notes 111-55 and accompanying text *infra.*

84. *E.g.,* Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153-54 (1982) ("Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.").

85. R. DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977).

86. *Id.* at 31-32.

a court might be guided by the recognition that weak review of some types of judgments is more likely to be conveyed through phrases using discretion. To recognize the proper instruction to follow, the court must look closely at the nature of the decisionmaking authority assigned to the agency. If the decision can be viewed as either right or wrong, usually according to some expressed or implied standards, then the review instruction means to convey a weak review of judgment and does not involve the complex question of review of true discretion discussed below. Once the court recognizes that it is not reviewing true discretion, its responsibilities are the same as with arbitrariness review because there is no functional difference between guarding against abuse of this sense of discretion and guarding against arbitrariness.

Judge McGowen has stated that the tests for arbitrariness and abuse of discretion are far from discrete and should be viewed as cumulative.[87] Discretion used in this sense focuses on the same type of decision, and the review instruction conveys the same general meaning. The instruction tends to refer to "discretion," however, where the decision must involve nebulous or ambiguous supporting conclusions. Where the decision is supported by a more evaluative-type of conclusion, the review instruction is more likely to use terms referring to arbitrariness.[88] No matter what phrasing is used, however, the intent is to instruct the court to tolerate a high risk of error in a decision which cannot or should not be tested more critically.[89]

A predominant example of this sense of discretion is the power to stray beyond the general rule in order to do individual justice.[90] Where Congress or the law has laid down rules for the general case, agencies often have implied

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87. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979).

88. *E.g.*, Nicholson v. Brown, 599 F.2d 639, 646, 648 (5th Cir. 1979). For example, courts tend to find that the failure to give reasons is an abuse of discretion—but not always. *See* City Fed. Sav. & Loan Ass'n. v. Federal Home Loan Bank Bd., 600 F.2d 681, 689 (7th Cir. 1979). The choice of methodology is usually reviewed as an exercise of discretion. BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 655 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980). Some courts say that abuse of discretion may be found "only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law." Song Jook Suh v. Rosenberg, 437 F.2d 1098, 1102 (9th Cir. 1971); *see* Jaimez-Revolla v. Bell, 598 F.2d 243, 246 (D.C. Cir. 1979). Courts tend to see the formulation of procedural rules as a question of agency discretion. *E.g.*, FTC v. Anderson, 631 F.2d 741, 746 (D.C. Cir. 1979). It might be an abuse of discretion for an agency not to exercise its discretion. *Id.* at 750 ("A citizen may be entitled to a court ruling that an agency exercise its discretion even though the court cannot say which way the discretion is to be exercised.").

89. "Abuse of discretion" has not been a particularly successful term in the law. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 762 (1982).

90. The Supreme Court has held that courts have similar types of discretion to make fine adjustments in the law. Hecht Co. v. Bowles, 321 U.S. 321, 328-31 (1944). Although it would seem that courts do not have discretion to allow statutorily proscribed conduct to continue, Platter, *Statutory Violations and Equitable Discretion*, 70 CALIF. L. REV. 524, 532 (1982), they continually withhold for themselves that discretion.

or expressed authority to tailor these rules to fit a particular case.[91] This residual power is called discretion, but it actually involves the exercise of judgment. Without doubt, the freedom to make such judgments improves decisionmaking and prevents considerable injustice; discretion in this sense is one of the major strengths of the administrative process. Nonetheless, such judgments can and should be reviewed.[92] A reviewing court can measure these decisions against the standards designed for the average case and against intended deviations; it can apply the "real" standard to judge the probability that the agency reached a correct individual decision. In reviewing these judgments, however, the reviewing court tampers with the very *raison d'etre* of agencies. Many agencies, indeed the entire administrative process, exist in order to embody the expertise and experience needed to carry out individualized administrative justice and such judgments must remain the preserve of the entities designed to make them.[93] For this reason, these individualizing judgments are generally reviewed for "abuse" or "excess." These terms mean, in this context, that the individualizing decision should be overturned by a reviewing court only when it finds a very high risk of error. Hence, these judgments must be reviewed under the same standard as that conveyed by the arbitrariness instruction.[94] Whatever the phrasing, such standards tell the

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91. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 42-43 (1969).

92. Professor Davis probably refered to this sort of discretion in his inquiries on discretion when he talked about discretion as individualizing. *Id.* at 4-6. Administrative law usually is referring to such activity by the decisionmaker when it investigates discretion.

One of the most important developments in the last few decades has been the recognition of the legitimacy of administrative discretion. Discretion is not, as some suggest, necessarily the result of unconstitutional or even poor legislation. J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 79-80, 93-94 (1978). It is the result of a conscious, and as Professor Davis demonstrates, potentially sound choice. K. DAVIS, *supra* note 91, at 42-43. Administrative discretion is the backbone of the administrative process and the element from which the process derives much of its operational value. Without doubt, such freedom is often necessary and prevents considerable injustice. Administrative schemes which do not incorporate such flexibility are vastly inferior to those which do. One of the worst trends in modern administrative law is a retreat from this flexibility, and the injury to citizens from this trend is apparent everywhere. It robs the system of much of its value. Administrative decisions relying on this sense of discretion are extremely valuable to a government which is useful and fair to its citizens. A sound administrative agency should have expertise and experience with the fine tuning covered by a mandate involving this sense of discretion. Therefore, judges should not become too involved in such judgments, and hence they are usually admonished to stay out of this kind of decisionmaking unless they find the risk of error very high.

93. There is also a desire to protect scarce judicial resources, especially since there is some doubt as to whether the courts contribute much to this decisionmaking. Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267, 1295 (1975).

94. Indeed, a court should be harsh with the agency only when it applies the rules more inflexibly than intended and fails to do individualized justice.

court to tolerate a relatively high risk of error.[95]

D. *Review Prohibited*

Some administrative programs completely withdraw certain decisions and issues from judicial oversight. The method by which this is done is described under the doctrine of unreviewability. Unreviewability performs the same mission as standards of review in that it also communicates the judiciary's function in a given administrative process. It differs in that it defines the extent to which a court is excluded altogether from a particular administrative process.[96]

The review system has two forms of unreviewability: one precludes review of certain judgments, and the other precludes review of the exercise of true discretion.[97] I argue in section II that true discretion is by nature unreviewable. Hence, the second form of unreviewability is considered along with the whole problem of review of true discretion. Here, the discussion focuses on instances where judgments are not reviewable. This discussion of the last step on the review scale, no review, will complete the treatment of the review system's decisions involving judgments.

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95. Although every reviewable administrative judgment should at least be reviewable for arbitrariness, courts sometimes limit themselves to a review which verges on acquiescence. Less frequently, courts will approve agency action after a cursory look at the expressed or even inferred basis for the action; they will consider only whether some justification can be found for the agency decision. *See, e.g.,* Mobil Oil Corp. v. DOE, 610 F.2d 796, 801 (Temp. Emer. Ct. App. 1979), *cert. denied,* 446 U.S. 937 (1980).

This level of review equates to the rational basis in constitutional challenges, where no special reason for heightened scrutiny exists. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 450-53 (1978). While administrative agencies implement legislation, such action never raises to the level of legislative action and carries none of the justification for such extreme judicial acquiescence. Even though agencies are often technically acting for the legislature, they are in fact an entirely different institution. *Compare* City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971) (rulemaking given less deference than legislation), *cert. denied,* 405 U.S. 1074 (1972) *with* Pacific State Box & Basket Co. .v. White, 296 U.S. 176, 185-86 (1935) (equal deference given). Although democracy demands that the judiciary act very cautiously in evaluating legislative action, administrative acts are not the decisions of a representative body, and there is no theoretical reason for judicial acquiescence. The fact that the agency implements actions by the democratic branches, Congress and the presidency, helps justify the limited review discussed above, but it does not require using the same test as applied to the democratic institution. The judiciary should not interfere with decisions of those institutions for reasons which do not apply to agencies.

96. A traditional distinction has grown between the area of review, reviewability, and the degree standard of review. *See* S. DOC. NO. 8, 77th Cong., 1st Sess. 83 (1941). Courts are prohibited from reaching beyond the area of review. Nevertheless, reviewability cannot be divorced from questions relating to standards of review. Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1052 (D.C. Cir. 1979).

97. 5 U.S.C. § 701(a) (1982); *see* note 2 *supra.*

The modern review system does not favor unreviewability of judgments.[98] Sometimes an administrative program will perform better if some or all of the necessary judgments are left completely to the agency. The APA permits such instruction by authorizing unreviewability "to the extent that" a statute or other law removes a decision from the area of review.[99] There are two implications of the APA provision.

First, the phrase "to the extent that" limits the operation of an unreviewability instruction to whatever specific part of a decision the instruction refers. Where part of a decision is unreviewable, courts have nonetheless corrected gross mistakes of law,[100] procedural inadequacy,[101] or the criteria under which an individual decision is made.[102] Moreover, even where a question seems completely removed from judicial scrutiny, courts can review the constitutionality of the underlying statute.[103]

The second implication of the APA provision is that unreviewability of judgment can be found only where an affirmative determination has been made that the courts should remain outside the review system. Evidence of this determination must be found in a statute, but the extent to which the preclusion must be clear on the face of the statute is a matter of some controversy. Some have argued that only express language can render an administrative decision unreviewable; others have argued that the traditional tools of legislative interpretation, such as legislative history and rules of statutory construction, should be used where the statute is unclear.[104] The second approach has the advantage of consistency with the ordinary way of reading statutes and the need to protect administrative programs from unintended judicial interferences. The first approach, however, expresses the modern aversion to

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98. *See, e.g.,* Abbott Laboratories v. Gardner, 387 U.S. 136, 139-48 (1967).

99. 5 U.S.C. § 701(a) (1982).

100. *See* L. JAFFE, *supra* note 13, at 359; Berger, *Administrative Arbitrariness: A Synthesis,* 78 YALE L.J. 965, 990-91 n.145 (1969). *But see* 4 K. DAVIS, *supra* note 1, § 28.16, at 80 (action committed by law to agency discretion is unreviewable).

101. Kletschka v. Driver, 411 F.2d 436, 443 (2d Cir. 1969) (imposed procedure which did not involve the court in wisdom of the unreviewable substantive decision of the Veteran Administration). Review may be limited to a designated group. Consumer Fed'n v. FTC, 515 F.2d 367, 369 (D.C. Cir. 1975).

102. Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1110 (D.C. Cir. 1974) (while parole decisions are unreviewable, criteria established by the board to make such decisions are not); Wayne State Univ. v. Cleland 590 F.2d 627, 631-32 (6th Cir. 1978) (unreviewability provision did not cover validity of Veterans Administration regulations).

103. *E.g.,* Johnson v. Robison, 415 U.S. 361, 374-83 (1974).

104. *Compare* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 630-31 (1976) (reviewability turns on judicial determinations rather than congressional intent) *with* Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967) (preclusion of review requires clear and convincing evidence of congressional intent) *and* Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act,* 1976 DUKE L. J. 431, 449 (express statutory prohibition or other persuasive evidence of congressional intent can preclude review).

unreviewability. If the system is said to require express preclusion, then fewer decisions will be removed from judicial supervision. The first view also recognizes that courts are perfectly capable of reviewing any decision involving judgment and that those decisions are usually unreviewable only because of factors such as judicial or administrative efficiency. Therefore, the system might well demand that preclusion of review of judgment should at least be clear if not necessarily explicit.[105]

E. *Coordinating the Instructions for Review of Administrative Judgment*

The distinctions among review authority have evolved because an effective judicial review system must provide a variety of judicial functions to meet the needs of particular administrative programs. The present system can tell the court to approach an administrative decision with one of four different attitudes, or instructions, then work in concert to make a sound, workable review system.[106]

The first instruction, agreement review, tells the court to determine whether it agrees with the agency's conclusion as to some or all of a decision. It tells the court to decide whether the weight of support is in favor of the agency. This instruction is the zenith of judicial authority, and any greater judicial involvement would require performance of administrative function in violation of the Constitution.[107] The instruction, often termed *de novo* review, is usually given where agreement review is required of the whole decision, or the court may be said to have the power to substitute judgment. Whatever form, agreement review gives the courts a very active role in an administrative program.

The second instruction tells the court to measure the agency's conclusion for reasonableness. It does not require the court to agree with the agency in order to uphold it, but only requires a determination that there is a relatively

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105. S. Doc. No. 248, 79th Cong., 2d Sess. 275 (1946).

106. Although the word formulas used to convey these instructions sometimes add to the confusion, they contribute to a sound structure. Whether we accept characterizations such as Judge McGowan's that are attitude designations, Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1049 (D.C. Cir. 1979), or see the word formulas in more legalistic terms, they do express distinct relationships, which can be converted into meaningful guidance for a reviewing court.

> In form, section . . . [702(2)] embodies a list of various adjectives or adjectival phrases—any one of which, if found applicable, requires our disapproval of the administrative action in question. These formulations are far from being entirely discrete as a matter of the ordinary meaning of language, and, indeed are in some respects cumulative rather than differential in their applicability.

Weyerhauser Co. v. Costle, 590 F.2d 1011, 1024 (D.C. Cir. 1978).

107. L. JAFFE, *supra* note 13, at 103-09. A general principle of constitutional law is that Congress cannot assign actual administrative functions to article III courts. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 13-14 (1980).

high probability that the agency is correct. Thus, a sharp break occurs between agreement review and reasonableness review; under the reasonableness standard the court is not an active participant in the decisionmaking process but is limited to supervision and monitoring. The reasonableness standard instruction is usually conveyed through the term "substantial evidence," but that term often leads to confusion when applied to nontrial-type procedure. This confusion is eliminated by recognizing that the instruction relates not to the kind of information but to the level of assurance it requires. It applies whenever a determination is made that a particular administrative program cannot tolerate a high risk of error. Such issues can be identified without regard for the structure of the decisionmaking process or the form of the record.

The third instruction tells the court to guard against arbitrariness. This instruction is usually conveyed by terms such as "arbitrary or capricious" or "abuse of discretion." While it places the court in a monitoring role, the instruction involves decisions or issues where the particular administrative program must or should tolerate a higher risk of error than that permitted under the reasonableness standard. Despite protest from some judges,[108] the distinction between reasonableness and arbitrariness is crucial to the success of the review system because it allows the system to communicate two very different judicial roles.

The key to this distinction is that the two instructions convey a search for two relatively different levels of confidence in the agency's decisionmaking. Reasonableness connotes the operation of a reasoning mind.[109] Reasonableness review, as applied to an agency decision, requires a finding that the decision is consistent with what one would expect if a reasoning individual had made it. Under this instruction the court must reach the *affirmative* conclusion that the decision is within the realm of a correct decision, but the court need not explore any further to assure that it is *the* correct decision (defined as the decision the court would have reached). Arbitrariness, on the other hand, requires a *negative* conclusion; the court must decide that the agency decision cannot be right. If it finds that the conclusion cannot be right, then it stops and reverses. If it finds that the conclusion might be right, the court stops and makes no further inquiry into how likely it is that the decision is right.[110]

Thus, while the semantic difference does not seem startling, there is a vast gap between the two perspectives. To find something arbitrary, the court must

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108. Judge Leventhal was among those who asserted that the arbitrary or capricious test and the substantial evidence test express converging or nearly identical degrees of judicial scrutiny. Leventhal, *supra* note 7, at 540. Judge Leventhal also has observed that in his long tenure on the appellate bench he had not found a case which was upheld under the substantial evidence test that would have failed under the clearly erroneous test. Discussion, *supra* note 7, (Hon. H. Leventhal), *reprinted in* 32 AD. L. REV. at 290.

109. L. JAFFE, *supra* note 13, at 596.

110. A pundit may contend that this accurately describes bureaucrats, and if this is the case, then everything the government does is arbitrary. I disagree.

reach a conclusion such as: "This is what I would expect of Attilla the Hun." Reasonableness, on the other hand, requires a positive attitude towards the decision, such as: "This is the kind of position one would expect of Marcus Aurelius with whom I always violently disagree." There is a tremendous gap between the two mental processes, and this gap expresses the distinction between reasonableness review and arbitrariness review.

The fourth instruction, unreviewability, tells the court that it has no role with respect to a decision. Sometimes a decision is made that a program would be better served if the agency acts as the final decisionmaker on some issues in a decision. The difficulty here is determining whether that decision to preclude judicial review has in fact been made. Even where the instruction is found, the courts may have some functions, such as interpretation of law or constitutionality.

This variety in review of decisions involving judgment is essential to a successful system of review, and judges must make the effort to determine what instruction applies to the decision before them. Section III will discuss how a judge is to make this determination. Before that, however, the unique problem of review of true discretion must be analyzed because it differs fundamentally from review of judgment.

II. REVIEW OF DISCRETION

Review of true discretion presents some very difficult conceptual problems. The concept of discretion itself is one of the most mysterious in the law.[111] The exercise of true discretion is often confused with other types of decisions, making the review instructions as to true discretion inadequately developed and difficult to communicate. Discretionary decisionmaking is one of the least understood legal concepts. Attempts at defining discretion have not been very helpful as guidelines to a reviewing court.[112] As a result, contemporary writing on the subject has been random and ambiguous.[113] Failure to isolate decisions that are the result of discretion from other types of decisions adds to confusion. The exercise of discretion is a very special type of administrative decision and must be reviewed consistently with this special nature. Only by isolating the question of review of discretion from other forms of review can the law develop the necessary concepts.

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111. *See, e.g.,* L. JAFFE, *supra* note 13, at 555-56; Platter, *Statutory Violations and Equitable Discretion,* 70 CALIF. L. REV. 524 (1982).

112. Friendly, *supra* note 89, at 754; Gifford, *Discretionary Decisionmaking in Regulatory Agencies: A Conceptual Framework,* 57 S. CAL. L. REV. 101, 102-03 (1984). *See generally* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES (1962).

113. *E.g.,* Friendly, *supra* note 89, at 754 ("[In] discussing the allocation of power between trial and appellate courts, I find it more useful to say that the trial judge has discretion in those cases where his ruling will not be reversed simply because an appellate court disagrees. If this be circular, make the most of it!"); *see also* Gifford, *supra* note 112, at 101-35.

The mystery surrounding the concept of discretion and the tendency to confuse it with other types of decisionmaking lead to very unsatisfactory instructions about the assigned judicial role in reviewing discretion. The term "discretion" is used very imprecisely in review instructions. For example, instructions relating to "abuse" or "excess" of discretion often refer to weak review of decisions which involve judgment, not true discretion.[114] Moreover, instructions as to review of true discretion are rarely explicit, and the nature of the court's role with respect to such decisions must be gleaned from more general review instructions or from the nature of the administrative decision. Consequently, this section offers guidance on identifying and understanding the exercise of discretion. It then looks at how courts should review discretion, including the question of whether they should review it at all.

A. *The Nature of Discretionary Decisionmaking*

The first step in understanding discretion is to separate it from decisions involving judgment, decisions that can be evaluated as right or wrong. The jurisprudential literature helps develop this distinction. For example, Professor Dworkin has explained:

> Sometimes we use "discretion" in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment. . . .
>
> . . . We use "discretion" sometimes not merely to say that an official must use judgment in applying the standards set for him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question. . . .
>
> . . . An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion. Of course this latter sort of freedom is important; that is why we have the strong sense of discretion. Someone who has discretion in this [strong] sense can be criticized, but not for being disobedient. . . .[115]

Thus, one can demand that a decision involving judgment be correct—that it conform to some expressed, implied, or derived standard. A reviewing court can evaluate the exercise of judgment according to the decision's probable correctness and can control for a certain risk of error. A court cannot demand, however, that the exercise of true discretion be right. A reviewing court can refer to some form of standard, but it cannot evaluate the discretionary decision according to such standards and it cannot focus its review on correcting

114. *See* text accompanying note 83-86 *supra.*

115. R. DWORKIN, *supra* note 85, at 31-33. *Compare* Gifford, *Decisions, Decisional Referents and Administrative Justice,* 37 LAW & CONTEMP. PROBS. 3 (1972) (internal, self-imposed constraints limit the exercise of discretion).

potential error.[116]

Professor Jaffe has offered extraordinary insight into the nature of the discretionary decisions. He recognized that review of discretion found its base in the fundamental existence of "a purported application of the statutory grant of power to the facts as found."[117] He separated these grants according to three types of rules they might create.[118] Of these three types of rules, two left no room for the exercise of discretion because the application of facts were conclusive. In contrast, the third type of rule merely suggested what type of facts are relevant but did not make them conclusive. Where the grant is of this nature, the agency must exercise true discretion because any standard which might be found or derived from the grant only guides the decision. In applying this vision of discretion, one that is consistent with Dworkin's insights, Professor Jaffe explained that discretion compelled

> . . .the administrator to resort to a whole complex of additional concepts and attitudes, official and personal, some of which he may not express, some of which he may be unaware of. . . . The mind focuses attention for a period of time on a group of authoritative decisional factors. But ultimately it reaches decision by an intuitive leap.[119]

The essence of discretionary decisionmaking is that knowable factors pass through an unknowable process to a decision. This, as Professor Jaffe suggests, can be analogized to an intuitive mental process. Intuition is the process of knowing, but without conscious reasoning. It is the ability of the subconscious mind to synthesize variables in a more complex way than can the conscious mind. For instance, one can recognize the color blue but would be hard pressed to define the color in words.[120] The equivalent of intuitive thinking in

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116. The nature of my inquiry here is to try to help judges understand their role in reviewing administrative action. The concept of discretion has plagued legal theorists for generations.

117. L. JAFFE, *supra* note 13, at 555-56.

118.

> For our present purpose of understanding the way in which rules function in a decision, we may note three types of rules. First, a rule may isolate a fact as determinative, as where, for example, an employee is barred from receiving compensation if his injury is attributable to his deliberate violation of a shop regulation. Second, a rule may provide that a fact is relevant but not conclusive. . . . There may be said to be a third category of rule. . . . It singles out a consideration as relevant, but provides no further rule for the application of the consideration.

Id. at 555.

119. L. JAFFE, *supra* note 13, at 555-56.

120. I can find no other way to convey a sense of the potential advantage of this sort of mental process than the following oriental fable:

> The centipede was happy, quite,
> until a toad in fun
> Said, 'Pray, which leg goes after which?'
> This worked his mind to such a pitch,
> He lay distracted in a ditch,

the administrative process is a blend of various decisionmakers with their special talents and instincts. The blending of decisionmaking elements creates a kind of decisional synergism, whereby the whole decisional process is greater than the sum of its parts.

Discretionary decisionmaking by an agency, therefore, takes special advantage of a wide variety of experience and expertise. Just as an individual thinking intuitively synthesizes an immeasurable array of data in his subconscious, an administrative institution exercising true discretion brings to bear on any problem a meshing of personnel with a variety of instincts, values, sensitivities, experience, and knowledge. This is one of the reasons Congress, or the common law, confers discretion on an agency rather than the more monolithic judiciary. The advantage of the agency is not just the special processes designed for specific decisions but also the bringing together of a special blend of contributors to the decisionmaking process. This second advantage finds its expression in the power to exercise true discretion.

Thus, the essence of review of discretion cannot be understood without recognizing that the advantage of discretionary decisionmaking lies in the freestyle interaction of these decisionmaking elements, not in the rationality of the decision itself. Discretionary decisionmaking cannot, by its nature, be as rational as decisions based on judgment. A court which fails to distinguish discretionary from judgment review robs the discretionary function of its richness and eliminates a major advantage of the administrative process.

Efforts to rationalize discretionary decisionmaking unsuccessfully attempt to add certainty where there can be no real certainty. Indeed, the temptation to simplify merely makes judicial decisions seem more satisfying, much the same way that any simplistic answer to a complicated and unanswerable question makes it more acceptable to unsophisticated observers.

The absence of any sense of correctness in discretionary decisionmaking justifies relying upon the interaction of an agency's decisionmaking elements, rather than the evaluative posture of the courts, to reach the best feasible result. For this reason, discretionary decisionmaking cannot be shared with or

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Considering how to run.

Intuitive thinking is a very slippery concept, especially for the Western mind. Oriental philosophies more readily see the value of mental processes based on intuition and they have explored it in considerable depth. The Western mind is more "scientific" and has been conditioned to reject the intuitive. In writing about this fundamental difference, Professor Northrop described it as the difference between a concept achieved by intuition and that by postulation:

> A concept by intuition is one which denotes, and the complete meaning of which is given by, something which is immediately appended. "Blue" in the sense of the sensed color is a concept by intuition. . . . A concept by postulation is one the complete meaning of which is designated by the postulates of the deductive theory in which it occurs. . . . "Blue" in the sense of the number of a wave-length in electro-magnetic theory is a concept by postulation."

F. Northrop, *The Complementary Emphasis of Eastern Intuitive and Western Scientific Philosophy,* in C. MOORE, PHILOSOPHY, EAST AND WEST 173 (1944).

evaluated by the courts.[121] A discretionary process can be analogized to the results of a lottery. Assume that Congress intended randomness to decide administrative issues through a lottery system. A reviewing court would then have the choice of letting the results stand or substituting its own non-random judgment. Similarly, the court cannot evaluate the actual result of the exercise of discretion, but must either accept the result or substitute its own decision.[122]

Therefore, courts must show special restraint in approaching discretionary decisions,[123] but discretionary decisionmaking is not beyond all review. Courts do have a monitoring function where an administrative program requires discretionary administrative decision. But this monitoring function differs fundamentally from the monitoring function in review of judgment.

B. *The Nature of Review of Discretion*

Once a court has identified a decision as one to be left to the true discretion of the agency, it is faced with the question of how to review that decision. The court knows it is not authorized to substitute its discretion for that of the agency, but it must realize that it still has some function. What this function should be, however, is much more difficult to derive and describe than its function with respect to review of judgments. The various types of review of judgment can be distinguished according to a sliding scale of potential correctness, but decisions based on true discretion cannot be evaluated in this way. How, then, is a court to approach administrative discretionary decisions?

The judicial function is better understood if the discretionary decisionmaking process is analogized to a black box. The part of the decision which results from true discretion comes from the black box, and there is no way to evaluate what went on to see how that result was reached.[124] The court can, however, take notice of the environment surrounding the black box and the

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121. *See* Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225, 226-27 (1981).

122. Care must be taken not to confuse review of the exercise of discretion with review of the exercise of randomness. The two are unreviewable for the same reason, but they are quite different in implementation. Choices made by randomness cannot be reviewed; either one set of chance or another makes the choice. For example, if housing is to be allocated among equally eligible people by lottery, then the result of a properly run lottery cannot be reviewed. In this sense the two are alike, but the process of using chance and process of relying on complex intuitive-like conclusions are very different. The former is unreviewable because it is totally insensitive, whereas the latter is unreviewable because it incorporates sensitivity to an incalcuable array of ingredients. It is for this reason that some type of judicial involvement is appropriate for discretion.

123. *E.g.*, BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 655 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980); Jaimez-Revolla v. Bell, 598 F.2d 243, 246 (D.C. Cir. 1979); Smith v. Saxbe, 562 F.2d 729, 734 (D.C. Cir. 1977).

124. A court's function is limited to assuring that the discretion is confined and controlled. Discretion can be controlled through innovations such as requiring agencies to formulate and disclose policy through rulemaking. *But cf.* Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1325-30 (1972) (rigid rules hamper agency flexibility).

external elements which bear on its operation. These external elements are visible even though the actual internal operation of the box is not.

One crucial external element is what actually enters the black box. As Professor Dworkin says, "An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his discretion is not controlled by a standard furnished by a particular authority. . . ."[125] Thus, while the actual exercise of discretion is an unknowable melding of factors, the court can assure that all relevant factors are part of the brew.[126] The reviewing court's first job is to identify these factors—which itself is difficult—and then ensure that they are not ignored by the administrative decisionmaker. Having gained this assurance, the court then must ensure that the administrative decision reflects the appropriate use of these elements, bearing in mind that the administrative decisionmaker "may freely use all permissible elements, though an excessive emphasis on one to the exclusion of other elements may be an abuse of discretion."[127]

Because the only real substantive review of true discretion must focus on determining that all relevant factors were considered, review tends to focus on the agency's explanation for its discretionary choice. A discretionary decision cannot be supported in the same way a judgment can, but it can be justified, giving consideration to relevant factors as well as explaining the use of experience and expertise. Requiring reasoned decisionmaking does not inject the court into the exercise of discretion so long as the court looks only for the existence of a sound basis upon which the discretionary decisionmaking process could have operated.[128]

In addition to assuring that all relevant factors entered the discretionary decisionmaking process, the court conducting abuse of discretion review must examine those elements which influenced the discretionary decisionmaking, those general pressures which push on the black box process. Discretionary

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125. R. DWORKIN, *supra* note 85, at 33.

126. Where the agency traditionally has broad discretion, it may be appropriate for the reviewing court to limit its examination for arbitrariness to the agency's explanation. *See* FCC v. WNCN Listener's Guild, 450 U.S. 582, 597-600 (1981) (broad discretion over policy questions); Dunlop v. Bachowski, 421 U.S. 560, 572-73 (1975) (prosecutorial-type discretion).

127. L. JAFFE, *supra* note 13, at 556. The judiciary in France and most western European countries will involve themselves in decisions based on absolute discretion. L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW 136-37 (2d. ed. 1973). Where the court exercises this discretion, it is the court, not the administrative official, which possesses the strong discretion. On the other hand, the French model confines jurisdiction over administrative action to a separate judicial apparatus, the Conseil d'état. Involvement in the discretionary decisions themselves by a special administrative court system does not seem as inappropriate as it would under our system, where the civil courts review administrative action.

128. Courts have been on notice since the Supreme Court's decision in Morgan v. United States, 304 U.S. 1 (1938) that "it is not the function of the court to probe the mental process" of the decisionmaker. *Id.* at 18; *see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

decisions which incorporate specific factors relevant to a particular decision are not made in a vacuum. They are subject to a variety of pressures which are internalized by the discretionary decision. Administrative justice can tolerate some of these pressures but not all of them, and the court must ferret out those influences which have exerted unacceptable pressure and which might have affected the operation of the discretionary decisionmaking process. The difficulty comes in distinguishing unacceptable pressures from those pressures which led to the vesting of discretion in the agency in the first place. It is difficult, for example, to distinguish unacceptable prejudgment from experience and expertise.[129] In reviewing true discretion, the courts must take care to sort out those pressures which properly channel the discretion from those which improperly skew the discretionary decision.

A reviewing court might, for example, overturn discretionary action because the discretionary decision is the result of bias or influence.[130] While the mere existence of such elements is not enough to conclude that the exercise of discretion is necessarily tainted, it might justify a finding of abuse when there is a substantial potential that these elements disrupted the proper functioning of the discretionary process. The subtlety necessary for this analysis is shown by the fact that only a very limited variety of bias has been found inappropriate for administrative decisionmaking.[131] Improper influence by political elements of government on the machinery of discretion may also give cause to find abuse,[132] but influence does not necessarily compel such a finding. Often influence is merely the valid incorporation of democratic consideration and hence is beyond the scope of judicial inquiry. On the other hand, the likelihood that some prohibited forms of bias or influence have distorted the discretionary decision would justify a finding of abuse of discretion.[133]

A court might also examine the discretionary machinery to ensure that the results were a true function of the black box.[134] Thus, abuse of discretion

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129. The notion of expertise suggests an understanding of facts gained from experience combined with informed predisposition. Reich, *The Law of the Planned Society,* 75 YALE L.J. 1227, 1242 (1966).

130. Standard Oil Co. v. FTC, 596 F.2d 1381 (9th Cir. 1979), *aff'd,* 449 U.S. 232 (1980), is an example of this type of analysis. The court properly found that the FTC's determination that there existed "reason to believe" that the law had been violated so as to support the issuance of an administrative complaint was within the FTC's absolute discretion. The only question it entertained was whether the exercise of this absolute discretion was tainted by congressional pressure. The Supreme Court found that the "reason to believe" determination was not reviewable until the administrative process was complete. 449 U.S. at 236.

131. Koch, *Prejudgment: An Unavailable Challenge to Official Administrative Action,* 33 FED. B. ASS'N J. 218 (1974).

132. *E.g.,* District of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1245-46 (D.C. Cir. 1971); Texas Medical Ass'n v. Matthews, 408 F. Supp. 303, 306-07 (W.D. Tex. 1976).

133. *E.g.,* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977); Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

134. Professor Schwartz formulated several categories of abuse. B. SCHWARTZ,

review might also evaluate the procedures used, in much the same way a court might examine a lottery machine to ensure that its results were truly random. Courts have a broad and inherent power to review administrative procedures,[135] but they cannot use procedural review to substitute their own discretion for the discretion assigned to the agency.

Consequently, although actual operation of the discretionary decision-making process cannot be evaluated, the external elements which operate on the process can be identified and examined to assure that they do not improperly skew the process. This is not flimsy review, but review of a kind different from the evaluative review applied to judgments.

C. *Review of Discretion and the Doctrine of Unreviewability*

The nature of review of true discretion leads directly to the concept of unreviewability within the context of true discretion. While a court can assure that relevant factors are considered and that the discretion is not skewed by improper pressures or procedures, it cannot stray into the actual discretionary decision. Consequently, when the decision involves true discretion, the doctrines of unreviewability and standard of review merge.

The distinction between judgment and discretion helps understand the relationship between the two. In the system for review of judgment discussed above,[136] the scale of possible review instructions ended with judgments which Congress withdraws altogether from judicial scrutiny. This unreviewability of judgment is codified in the APA by the statutory preclusion provision.[137] Because there is nothing in the nature of these judgments which precludes review, the preclusion must be directed by express language or, at the least, clear intent.[138] Preclusion of review of discretion is quite different and this difference is also codified in the APA; with respect to true discretion, the APA precludes review "to the extent that" the agency decision is "committed to agency discretion by law."[139] The combination of these two phrases has long been interpreted as precluding review only where the assignment of discretion is so complete that judicial scrutiny would be improper[140] and the decision *so* committed to agency discretion as to foreclose the possibility of a role for the court.[141] In short, the APA preclusion provision codifies the inherent unreviewability of the discretion.

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supra note 35, at 611.

135. *See* notes 268-80 and accompanying text *infra.*

136. *See* notes 96-105 and accompanying text *supra.*

137. 5 U.S.C. § 701(a)(1) (1982).

138. *Abbott Laboratories,* 387 U.S. at 140-41.

139. 5 U.S.C. § 701(a)(2) (1982).

140. MANUAL, *supra* note 3, at 95.

141. 4 K. DAVIS, *supra* note 1, at 80. The language of the original APA—"except so far as"—expressed this intention somewhat more clearly. Administrative Procedure Act, ch. 324, § 10, 60 Stat. 237, 243 (1946).

The Supreme Court in *Overton Park* provided a standard for determining whether a decision is so committed to agency discretion as to make it by its nature beyond judicial scrutiny.[142] In arguing against judicial authority over the Secretary's decision to approve a highway through a public park, the government in *Overton Park* argued that such decisions were so committed to the Secretary's discretion as to preclude review. The Court found that a decision could be committed to agency discretion to such an extent as to preclude review only when there was "no law to apply."[143] The Supreme Court means by "no law to apply" that there are no standards by which to evaluate the decision.[144] If there are no standards to apply, then there is no way a court can review it without usurping the discretionary function assigned to the agency.[145] If the court finds that the agency decision is the result of such authority, then it cannot evaluate the decision without usurping that authority, because there are no standards by which to evaluate it.[146] The decision is to be the result of the intuitive or discretionary process discussed above.[147]

Therefore, the scope of unreviewability of discretionary decisionmaking, as interpreted by the Supreme Court in *Overton Park*, fits the conclusion already reached with respect to the nature of review of the exercise of discretion. Where there are standards by which the decision can be evaluated, whether expressed by or derived from the law, then the court can exercise proper review by using these standards. If no standards exist, or the standards are intended only to guide the agency decision, then the decision involves true discretion. As the Supreme Court put it, there is "no law to apply" where no

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142. 401 U.S. at 415-17.

143. *Id.* at 413; *see* S. Doc. No. 248, 79th Cong., 2d Sess. 212 (1946) ("If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review."). As suggested by the drafters of the APA, "law to apply" might not be the only factor although *Overton Park* has raised it to a special place. Other factors were formulated in Saperstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 366 (1968). The Third Circuit has suggested criteria which include: (1) the broad discretion given an agency in a particular area; (2) the extent to which the action is a product of political, economic or managerial choices that are inherently not subject to judicial review; and (3) the extent that the challenged action is based on some knowledge or expertise. Local 2855, AFGE v. United States, 602 F.2d 575, 578-80 (3d Cir. 1979); *see* Bullard v. Webster, 623 F.2d 1042, 1046 (5th Cir. 1980).

144. *See Overton Park,* 401 U.S. at 413.

145. See the examples given in MANUAL, *supra* note 3, at 94-95. A similar result controls judicial review of trustee's decisions. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 comment g, i (1959); 4 A. SCOTT, THE LAW OF TRUSTS § 334.1 (1967) ("If there is a standard by which the reasonableness of the exercise of the trustee's discretion can be tested, the court will control the exercise of his discretion if, but only if, he acts beyond the bounds of a reasonable judgment.").

146. The phrase in section 701(a)(2) "by law" includes common law, custom, and tradition. The phrase broadens the search for the discretionary nature of decisionmaking. *See* Kliendienst v. Mandel, 408 U.S. 753, 769-70 (1972); United States *ex rel.* Schonbrun v. Commanding Officer, 403 F.2d 371, 374-75 (2d Cir. 1968).

147. *See* text accompanying notes 119-23 *supra.*

standards exist or where they are not mandatory.[148] Again, these decisions can be monitored by courts searching for the defects discussed above, but they cannot be judged for potential correctness.[149]

A titanic controversy, however, rages over the message of the discretionary unreviewability provision of the APA. Professor Davis has argued that when a decision is "committed to agency discretion by law," a reviewing court can do no review whatever, not even for abuse of discretion.[150] Judge Friendly created a line of authority through his opinion in *Wong Wing Hang v. INS*[151] whereby the courts still retain some review authority even where the action is committed to agency discretion. His view was that a reviewing court is still authorized to question whether the agency exercised its discretion properly. Several commentators support the notion that a reviewing court can at least guard against the exercise of discretion which is outside permissible bounds.[152] Under Judge Friendly's approach, statutorily commanded unreviewability may stand alone at the point where judicial review is completely precluded, and unreviewability of discretion may fall somewhat short of this absolute preclusion.

The controversy which rages between Davis on one side and Friendly, Jaffe, and company on the other over whether review of discretion can ever be totally precluded, is a rather empty dispute. Both sides would review factors which have an impact on the exercise of discretion to ensure against abuse, and indeed such review seems commanded by the "to the extent that" language in section 701. It is easy to agree with Friendly's view that discretion is always reviewable for those factors he identified,[153] and at the same time to

148. *Overton Park*, 401 U.S. at 413. Nevertheless, this concept seems inconsistent with the nondelegation doctrine, which finds unconstitutional any standardless delegation of legislative power. *See* Carter v. Carter Coal Co., 298 U.S. 238, 292 (1936); Butterfield v. Stranahan, 192 U.S. 470, 496 (1904); Field v. Clark, 143 U.S. 649, 692 (1892). If so, then a statute such as that given as an example in the MANUAL, *supra* note 3, at 94, which authorized the President to act "if in his judgment" the action was necessary may have conferred unreviewable discretion, but it may also be an improper delegation. Indeed, the APA legislative history hints that the exercise of so broad a delegation would not be reviewable, but the underlying statute would be subject to attack: "Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative power." S. DOC. NO. 248, 79th Cong., 2d Sess. 275 (1946). Of course, *undelegated* discretion could be unreviewable "by law," *e.g.*, a military decision, without running afoul of the nondelegation doctrine. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 177 (2d ed. 1978).

149. *See* S. DOC. NO. 248, 79th Cong., 2d Sess. 275 (1946) ("Matters of discretion are necessarily exempted from the [judicial review] section since otherwise courts would in effect supersede agency functioning.").

150. 4 K. DAVIS, *supra* note 1, § 28.16, at 80.

151. 360 F.2d 715 (2d Cir. 1966).

152. L. JAFFE, *supra* note 13, at 359; Berger, supra note 100, at 969.

153. Even when an administrative decision is so committed to agency discretion as to preclude review, a court could still find abuse of discretion if the agency action "were made without rational explanation, inexplicably departed from established poli-

agree with Professor Davis that the discretion itself is beyond a reviewing court's reach. Davis's general discussion of review agrees with the Friendly position that a reviewing court can question those things which might have an impact on the exercise of discretion or guarantee that the agency performed its discretionary duty as assigned.[154] To be consistent, Professor Jaffe, who shares Judge Friendly's view, must be read to agree that, while those things which motivate the "intuitive leap" are reviewable, the actual leap itself, or discretionary decision, is not.

The two views are reconciled by seeing that each administrative decision involves the resolution of a myriad of different issues. Some of those issues may involve discretionary decisionmaking. If so, they are unreviewable. Other issues, those which do not involve the exercise of discretion, may be reviewable. The court still may have a duty to evaluate the decision itself on reviewable issues. Even where the whole decision is discretionary, certain issues arise which invite the judgment of the courts. For example, the courts may review procedures, and the criteria by which the discretionary decision is made,[155] even when the underlying substantive decision is discretionary. Both views of the preclusion section understand this limit on review and hence the struggle between the two views seems unnecessary.

III. Discerning the Right Message

The foundation of a strong judicial review component in the administrative process is the existence of a sufficient variety of instructions which communicates the optimum judicial role to a court. A system of instructions permits Congress to investigate and then communicate how the judiciary can best serve the particular administrative scheme.[156] The major premise of this Arti-

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cies or rested . . . on other 'considerations that Congress could not have intended to make relevant.'" Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966) (Friendly, J.) (quoting United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950)).

154. In discussing § 701(a)(2), Professor Davis has observed: "So far as the action is by law 'committed' to agency discretion, it is not reviewable. . .; it is not 'committed' to agency discretion to the extent that it is reviewable. 4 K. Davis, *supra* note 1, at 80. "Extremely important is . . . that agency action may be partly committed to agency discretion, even though it is in some aspects reviewable." *Id.* at 84.

155. *See* notes 101-02 *supra.*

156. The limitations of language impede a clear explanation of the instructions for review. *See, e.g.,* Gardner, *supra* note 3, at 820 ("One emerges from this trail through a thicket of numbers [from the empirical survey] without having discovered any clear and consistent pattern, whether of close judicial supervision or of deference to the agency's responsibilities."); Gellhorn & Robinson, *Perspectives on Administrative Law,* 75 Colum. L. Rev. 771, 780 (1975) ("At best, concepts such as 'substantial evidence' tend to be little more than convenient labels attached to results reached without their aid.").

> Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful. . . . There are no talismanic words

cle is that such a system is in place and is fundamentally sound. It has just enough variety of instructions to communicate the several judicial roles for administrative decisionmaking relying on judgment, and it perceives the way the courts must approach the discretion. Now we need only to explore how this system communicates those instructions. Congress unfortunately does not often express its intent with clarity and precision. Thus, we must look for meaningful devices for discerning congressional intent. These devices also serve to guide the judiciary in finding the optimum role in a given scheme where there is no discernible message from Congress. This develops the best allocation of agency and judicial decisionmaking responsibility.

Two methods currently exist for determining the will of Congress with respect to judicial review: the process-oriented approach, and the issue-oriented approach. These methods add precision to the crude hints Congress usually leaves as to its intent, and they aid in the development of the common law where Congress has left a gap.[157] Both are used by courts in seeking congres-

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that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) (Frankfurter, J.).

157. Final orders are now reviewed almost exclusively under petitions for statutory review, with the standard usually set by Congress. Statutes requiring formal adjudication invariably prescribe substantial evidence review. Direct review of rules presents a tougher question. It is well established that direct review provisions cover pre-enforcement review of final rules from formal and informal procedures. It does not appear, however, that this affects the scope of review. Review of rules under direct review is substantial evidence only if the statute so provides or if the rule is made on a formal record. Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum,* 75 COLUM. L. REV. 1 (1975).

If no statute provides for access to the courts, a challenge must proceed through a non-statutory vehicle. The choice of means affects the standard of review. The best choice is the general utility remedy: injunction or declaratory judgment. This remedy is even more attractive now that federal question jurisdiction requires no amount in controversy, 28 U.S.C. § 1331 (Supp. IV 1980), and recent amendments to the APA have made it easier to sue the government where no money is sought. *See* H.R. REP. NO. 1656, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6121, 6121. The only limits on this form are general theories on the standard of review and the equitable nature of the remedy. Courts often demand that irreparable harm and the absence of an adequate remedy at law be shown. These prerequisites are largely a pleading problem, for most courts tend to be lenient in examining them.

The role of the common law writs continues to decline. Mandamus is most commonly used, although nothing can be done through mandamus that cannot be accomplished through a mandatory injunction. Technically, however, mandamus can be used only to compel ministerial acts and not discretionary functions. Although the courts have stretched this form as far as possible, its limits on the standard of review make mandamus extremely unattractive. Its prior advantage, the opportunity to circumvent amount in controversy requirements, has been nullified by changes to § 1331.

Although ostensibly a means to test only the legality of confinement, habeas corpus has been used to gain review of the conditions of confinement. Like mandamus, the habeas writ may have once been useful for evading amount in controversy and exhaustion requirements. Given recent changes, there is no reason why an injunction or declaratory judgment action cannot substitute for the writ when administrative action

sional will or in fashioning optimum rules for themselves. The process-oriented approach keys the type of review to the process whereby the agency is to make the decision. This process analysis furthers the inquiry because the procedures used affect the agency record that reaches the court, which in turn affects the depth and nature of the review.

The process, and the record it produces, are not the only factors which describe the nature and depth of review. The type of issue under review is more important. In any given process, the function of the reviewing court varies according to the several decisions which lead to the final decision. Indeed, greater emphasis on defining the judicial role according to component issues in a decision will add considerable precision to describing the review function. This issue-oriented approach is already used and finds support in many sound opinions.[158]

Although the process analysis receives more frequent use, its limitations suggest the need for a shift to greater use of issue-oriented instructions and analysis. The two approaches work well together. The process-oriented approach gives a crude approximation of the general level of review required, while the issue-oriented approach adds precision. The two approaches are, therefore, analyzed below.

A. *The Judicial Role According to the Administrative Process*

The reviewing court must first ask, of course, what type of review Congress intended when it established the particular administrative process. The statute may either give instructions through one of the word formulas or through the type of procedure the agency must follow to make the decision. In recognition of the latter possibility, the APA attempts to fill any legislative gap by prescribing review authority according to the type of procedure used.[159] Even when one of the word formulas is used, that formula is usually consistent with the review appropriate for certain procedures. Thus one way to determine the type of review prescribed is to look at the type of procedure and the type of record it produces.

1. Using the Administrative Process to Discern the Type of Review

The role of the courts is affected by the type of procedure used to reach the administrative decision. This leads to some confusion, because the adminis-

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is involved.

Prohibition and certiorari are suitable only for reviewing quasi-judicial actions, so their use leads to useless debate over whether quasi-judicial or administrative action is involved. Quo warranto is proper only for questioning the right to hold office, not official misconduct or the legality of a particular action. The limitations on the standard of review inherent in the form of action make the general utility theory more attractive.

158. *See* text accompanying note 236 *infra.*

159. *See* 5 U.S.C. § 706 (1982).

trative process allows such a great variety in procedure. Fortunately, order is restored by the grouping of similar types of procedure.

Basic order in the administrative law system comes from two major procedural distinctions: the distinction between adjudication and rulemaking, and the distinction between formal, or trial-like procedures and other methods for gathering information and incorporating participation.[160] Most administrative decisionmaking processes are either rulemaking or adjudication. From these two basic distinctions, administrative law has divided administrative activities into four categories: formal adjudication, informal adjudication, formal rulemaking, and informal rulemaking.[161] Distinctions between these categories are sometimes vague; this is especially true when making borderline distinctions. Nonetheless, the categories offer an analytically sound system, which becomes the foundation for analyzing procedural questions in administrative law. The judicial role in the administrative process is affected by the nature of the four fundamental processes, because each tends to produce a distinct type of record for review.

Although an administrative program may use any of the four processes, judicial review tends to be designed around the concept of a formal, trial-like proceeding. Appellate courts are accustomed to reviewing formal records both from courts below and from formal adjudicative processes in agencies. Not only do appellate courts traditionally review trial-like records, but the mechanics of appellate review incorporate the notion of a formal record. The Judicial Code, in its list of items which should be in an administrative record, clearly contemplates evidence and other materials of the type produced in a formal adjudicative proceeding.[162] The history and interpretations of the provision re-

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160. An adjudication is any agency action which decides individual rights or duties. *See generally* Fuller, *The Forms and Limits of Adjudication,* 92 HARV. L. REV. 353 (1978). Rulemaking is action of a general nature that is substantially prospective in impact. United States v. Florida E. Coast Ry., 410 U.S. 224, 246 (1973). Some agency functions, such as data-gathering, fall outside these categories. Advice-giving, however, is auxiliary and perhaps related to rulemaking and adjudication. *See* Sinai Hosp. v. Horvitz, 621 F.2d 1267, 1269 (4th Cir. 1980).

Formal procedures equate to a bench trial. S. DOC. No. 8, 77th Cong., 1st Sess. 61 (1941). Although informal procedures and trial procedures share some elements, they are significantly different. Verkuil, *A Study of Informal Adjudication Procedures,* 43 U. CHI. L. REV. 739, 739 n.1 (1976); Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis,* 42 U. CHI. L. REV. 401, 401-02 (1975). The informality varies considerably. Social Security Administration adjudications, for example, remain technically informal despite their many trial-like elements. *See* Matthews v. Eldridge, 424 U.S. 319, 339 (1976); Richardson v. Perales, 402 U.S. 389, 400 (1971).

161. Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1160 (D.C. Cir. 1979), *cert. denied,* 447 U.S. 921 (1980); S. DOC. No. 248, 79th Cong., 2d Sess. 267 (1946).

162. 23 U.S.C. § 2112 (1982). The Administrative Procedure Act defines formal records in 5 U.S.C. § 556(e) (1982); *see also* MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 9(e) (1961), 14 U.L.A. 404 (1980).

inforce this narrow perception of the kind of information package or record which is to be presented for review.[163] The system is designed for, and the judges are accustomed to handling, only one type of administrative record.

When faced with an administrative record produced by formal adjudication,[164] a reviewing court can be relatively confident in its ability to test the correctness of the administrative decision. The proceeding is dominated by questions about specific facts. Trial procedures are particularly suited to the resolution of specific facts, and the reviewing court has the kind of information it needs to hold the agency to a standard requiring a relatively high probability of correctness. For this reason, the system traditionally holds decisions resulting from formal, trial-like administrative process to the reasonableness standard, usually expressed as substantial evidence.[165]

Administrative proceedings, however, rarely produce a record totally compatible with a trial court's record. Even the formal administrative hearing process, which creates a record similar in form to a trial court record, sends to the reviewing court a variation on that form. The court, for example, may face a record with written "evidence,"[166] information which would not have passed the admissibility screen if presented in a judicial trial,[167] or a decision based on no admissible evidence at all.[168] Thus, even trial-type procedures require a reviewing court to conduct review on a record which deviates from the record coming from a lower court. Nonetheless, the content and quality of the formal

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163. S. REP. No. 2129, 85th Cong., 2d Sess. 2 (1958), *reprinted in* 1958 *U.S. Code Cong. & Ad. News* 3996, 3997.

164. *See* 5 U.S.C. § 554 (1982).

165. *Id.* § 706(2)(E). The APA requires substantial evidence review for all decisions made through §§ 556-557 procedures. These are trial-like procedures required in formal adjudication and formal rulemaking. This provision expresses the law at the time of the passage of the APA, MANUAL, *supra* note 3, at 109, and continues to represent the accepted theory.

166. Various agencies have adopted summary judgment procedures for decisions which must be made on a record after opportunity for agency hearing. These procedures use mostly written evidence and limit oral presentation to disputed issues of material fact that cannot be resolved in a written record. VI SENATE COMM. ON GOVERNMENT AFFAIRS, STUDY ON FEDERAL REGULATION, 95th Cong. 1st Sess. 36 (1977); Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study,* 64 CALIF. L. REV. 14 (1976); Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication,* 84 HARV. L. REV. 612 (1971).

167. In formal adjudication, "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d) (1982). It has long been established that an agency may admit into even a formal record information commonly relied upon by reasonable, prudent persons in the conduct of their affairs. NLRB v. Remington Rand, Inc., 94 F.2d. 862, 873 (2d Cir. 1938); 1 K. DAVIS, *supra* note 1, §§ 14.01-.17.

168. Richardson v. Perales, 402 U.S. 389, 402 (1971). Federal courts have traditionally rejected the residuum rule, which requires a residuum of corroborative evidence admissible in court in order to withstand the substantial evidence test. K. DAVIS, *supra* note 104, § 14.11.

record is sufficient to hold the agency to a high probability of correctness expressed by the reasonableness standard.

Most of the processes producing decisions affecting private citizens do not use trial-type procedure and produce a very informal record.[169] Courts traditionally have a great deal of difficulty reviewing such records. The Supreme Court has given some guidance in identifying the reviewable record in informal decisionmaking. The most valuable opinion is the short per curiam Supreme Court opinion in *Camp v. Pitts*.[170] The Court laid the foundation for a workable concept of the informal agency record:

> [T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.
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> . . . The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record . . . [then it must be remanded].[171]

A court is thus instructed to review the compilation of information, whatever its form, upon which the agency made its decision. Nonetheless, since there is no established, uniform method for creation of informal records, there is no uniform structure or content to the record created by informal decisionmaking. The reviewing court is presented with a "record" that often lacks structure and that may have absorbed, sometimes merely by chance, any manner of information. A court faced with the myriad of informal records must wrestle with unfamiliar structure and content.[172]

A reviewing court is likely to find even more disconcerting the absence of the same quality controls which are present in a formal, trial-type record. A reviewing court depends on the techniques of trial to screen the information which enters the record. For example, rules of relevance keep out extraneous information, and rules of admissibility maintain the integrity of the information which does enter the record. Devices such as cross-examination test testimonial evidence and those such as authentication test documentary evidence.

The informal process is a conscious compromise of these structural and quality controls. The administrative decisionmaker, as well as the court, must deal with the same deficiencies in the information-gathering process of infor-

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169. Gardner, *The Procedures by Which Informal Action is Taken,* 24 AD. L. REV. 155, 156 (1972). For a historical prospective, see S. DOC. NO. 8, 77th Cong., 1st Sess. 35 (1941).

170. 411 U.S. 138 (1973) (per curiam).

171. *Id.* at 142-43.

172. Therefore, in the first instance a reviewing court must rely on the agency's submission even where it is not confident in the agency's efforts. Some help is also found in that by the time the informal decision has worked its way through the administrative process, a more structured and loosely identifiable record has been compiled. Where the informal record cannot serve the judicial review function, the Supreme Court has authorized lower courts to request affidavits or to call officials to testify. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

mal procedures. The administrative decisionmaker must come to the best possible conclusions based on these records. Therefore, the court cannot review this information under a test which calls for a high probability that the agency's decision is correct. Review of decisions reached through informal procedures is traditionally subjected to the arbitrariness standard.[173]

A lesser demand for correctness, and the commensurate lowering of the standard of review, is justified by the advantages perceived in informal proceedings.[174] Otherwise, it would be ironic that less judicial scrutiny is afforded the very agency actions which demand less of the initial decisionmaker. Informal procedures compromise some procedural guarantees of correctness in favor of other advantages, and the review system must comport with those compromises.

Informal adjudication, for example, may involve issues similar to those which often appear in court, *e.g.*, adjudicative facts, but the judicial model has been rejected for other reasons. It may be that the creators of the program sought to avoid the cumbersome judicial model at the agency level, and that it should not be built back into the process at the review stage. In such proceedings, the courts avoid this result by limiting their review to assuring against an unacceptably high risk of error. Thus, the limited function of the courts expressed by the arbitrariness standard is consistent with the original provision for a nonjudicialized decisionmaking.[175]

Rulemaking procedures similarly incorporate goals other than factfinding which the review system must take into account. The system must include, for example, an affirmative effort to gain broad public participation—something which is impossible for the judicial process.

Rulemaking, particularly informal rulemaking,[176] creates an amorphous and undistilled record—a record filled with questionable facts and loose opinions. The information package created during rulemaking presents the review-

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173. CF&I Steel Corp. v. Economic Dev. Ass'n, 624 F.2d 136, 139 (10th Cir. 1980).

174. *E.g.*, Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 783-91 (1974); Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 84-87 (1976).

175. These cases probably do not need extensive factual development. Judge Friendly has observed:

> Except for administrative appeal or judicial review, there would seem to be no need for any "record" in the typical mass justice case; the facts are simple enough that the hearing officer can render a decision on the basis of his recollection and notes, as is done in England. Even administrative appeal or judicial review would not require a transcript; for centuries appeals were heard on the judge's notes.

Friendly, *supra* note 93, at 1291-92.

176. 5 U.S.C. § 553 (1982).

ing court with a record that it is particularly uncomfortable with.[177] Because the APA requires courts to review the whole record,[178] a court reviewing rulemaking is responsible for the entire unstructured mass which makes up the rulemaking record.[179] Even through more formal procedures, such as "hybrid rulemaking," rulemaking still creates records with information which is not tested by the procedural devices of trial.[180] The nonjudicial nature of rulemaking records has therefore caused problems for reviewing courts. Courts have, however, generally managed to review them.[181] The nature of the factfinding

177. Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1161 (D.C. Cir. 1979), *cert. denied,* 447 U.S. 921 (1980); Bradford Nat'l Clearing Corp. v. SEC, 590 F.2d 1085, 1104 (D.C. Cir. 1978); Aqua Slide 'n' Dive Corp. v. CPSC, 565 F.2d 831, 837 (5th Cir. 1978) ("record in this case is a jumble"); 1 K. DAVIS, *supra* note 148, §§ 6:5-:6.

178. 5 U.S.C. § 706(2) (1982).

179. Appellate courts have long accepted responsibility for reviewing records accumulated through informal rulemaking. This issue was faced squarely in the controversy over whether direct review to the appellate courts was available for informal rulemaking records that were not adequate for appellate consideration. In United Gas Pipeline v. FPC, 181 F.2d 796, 798-99 (D.C. Cir.), *cert. denied,* 340 U.S. 827 (1950), the court held that direct review was not available for informal rulemaking. Later, however, the circuit changed its mind and direct review of rulemaking became the firmly established practice. Currie & Goodman, *supra* note 157, at 39-40; Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 196-205 (1974).

Administrative law is learning more about the "rulemaking record." Professor Davis has accomplished a good deal in developing this understanding. *See* 1 K. DAVIS, *supra* note 148, § 6:10.

The latest revision of the Model State Administrative Procedure Act, § 3-112(c) (1981), specifically permits review to stray beyond the official rulemaking record. 14 U.L.A. 102 (Supp. 1984).

180. Much of the thinking about this problem began with the Magnuson-Moss provision for FTC rulemaking. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 109, 88 Stat. 2183, 2189 (1974) (current version at 15 U.S.C. §§ 45-58 (1982)). It defines the "hybrid" record created by those procedures: " '[R]ulemaking record' means the rule, its statement of basis and purpose, the transcript [of any oral presentation, and cross-examination in an informal hearing], any written submissions, and any other information which the Commission considers relevant to such rule." 15 U.S.C. § 57a(e)(1)(B) (1982). Of course there is nothing "hybrid" about this record; it is simply a larger informal rulemaking record with a portion of the written material appearing as transcript.

Unlike formal adjudication, where the person who presides at least issues an initial decision, informal rulemaking rarely involves a presiding officer who makes any decision. Thus, the decision is made on a totally written record, part of which is the written memorialization of the oral testimony.

The Administrative Conference's report on FTC rulemaking, for example, spends a good deal of space on the problem of the unstructured and cumbersome rulemaking record. BOYER, TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION: A REPORT TO ADMINISTRATIVE CONFERENCE OF THE UNITED STATES BY THE SPECIAL PROJECT FOR THE STUDY OF RULEMAKING PROCEDURES UNDER THE MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION ACT (1979).

181. The Administrative Conference found that "[c]ompliance with [the] proce-

in these records, as in informal adjudication, makes the greater tolerance for error in arbitrariness review more often appropriate.[182]

The objective of rulemaking, however, provides an even more compelling reason for weak review. The conclusions reached through rulemaking usually go to determinations of policy. Policy questions raise some very special problems for the agency and ultimately for a court. Where the conclusions involve judgments, they cannot be made with a high level of confidence in their correctness, and are not usually amenable to clear demonstrations or proof of correctness. Consequently the type of judgments made in rulemaking are traditionally subjected to arbitrariness review.[183] Moreover, many policy conclusions are not by nature of a kind which can be termed correct, for often policymaking involves the exercise of true discretion and the courts cannot evaluate the conclusions themselves.[184] Thus, in reviewing the results of rulemaking a court must show considerable restraint, both in accepting a relatively high risk of error on questions involving judgment, and in avoiding substituting its own discretion for that of the agency. In general, the law surrounding review of decisions made through rulemaking procedures incorporates the need for this restraint.[185]

One anomaly in this treatment of rulemaking is the review of nonlegislative rules, such as interpretative rules and general statements of policy. Nonlegislative rulemaking is an expression of an agency's inherent authority to articulate its view of the law under its charge.[186] Such rulemaking, unlike leg-

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dural requirements of 5 U.S.C. § 553 . . . will ordinarily produce a record adequate to the purpose of judicial review." The Choice of Forum for Judicial Review of Administrative Action, 1 C.F.R. § 305.75-3 (1983). For an excellent treatment of the procedural alternative open to a court reviewing rulemaking, see Gifford, *Administrative Rulemaking and Judicial Review: Some Conceptual Models,* 65 MINN. L. REV. 63 (1980).

Although courts of appeals have declined jurisdiction to review interpretative rules promulgated without notice and comment procedure because there is no administrative record to review, National Ass'n of Ins. Agents, Inc. v. Board of Governors of the Fed. Reserve Sys., 489 F.2d 1268, 1271 (D.C. Cir. 1974), there is no reason why the doctrine of *Camp v. Pitts* would not apply to interpretative rules.

182. Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866-67 (1983).

183. Formal rulemaking, a procedure decreasing in popularity, is generally subjected to substantial evidence or reasonableness review. *See* 5 U.S.C. 706(2)(E) (1982). While the record is more like that of a trial, although somewhat less manageable, *see* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need of Procedural Innovation in Administrative Rulemaking,* 60 CALIF. L. REV. 1276, 1291-92 (1972), the issues involved are not the kind that can be tested to a high probability of correctness. Thus, formal rulemaking also should be subjected to arbitrariness review.

184. *See* text accompanying notes 240-51 *infra.*

185. Due to the type of issues which dominate rulemaking, most formal rulemaking must also be subjected to very limited review.

186. Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy,* 64 GEO. L.J. 1047, 1048-50 (1976).

islative rulemaking, is not based on a delegated authority to make rules. It is essentially a device whereby the agency can disclose its interpretations of its law. Such rulemaking need not involve any public participation and is not required to comply with the procedures designed for that purpose.[187] Courts must subject nonlegislative rules to *de novo* or agreement review and are free to substitute their judgment for rules they find incorrect.[188] Nonlegislative rules are not an extension of legislative authority and do not have the force of law. Courts must recognize, however, that the predominant issues are the same in nonlegislative and legislative rulemaking. All rulemaking, for example, involves some policymaking. The review system, therefore, demands that the courts show great restraint in reviewing policy conclusions no matter what form of proceeding is under review.[189] The current system has compromised these conflicting concepts by admonishing the courts to show great deference to the agency's nonlegislative rules even though they are operating under the agreement review standard.[190]

Looking at the whole review system, it is clear that the type of agency procedure should and does affect the type of review. The due process explosion,[191] however, has confused judicial review because it has forced courts to review nontraditional forms of administrative "records." The structure and quality of the record presented to the reviewing court necessarily affects judicial responsibility.[192] Courts are accustomed to screening devices, such as rules of relevancy and admissibility, which structure the record and give it form. Administrative procedures, however, rarely produce this type of record. Agency records often deviate substantially from trial records.[193] Nonetheless, agency records must perform the same function as that performed by a traditional record. Thus, it is essential that judges understand the concept of the agency record and the effect of the informal administrative processes on the record presented to a reviewing court.[194]

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187. *Id.*

188. *Id.* at 1050-51.

189. *See* text accompanying notes 240-51 *infra.*

190. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

191. Friendly, *supra* note 93, at 1268.

192. McGowan, *Judicial Review of Agency Action,* 20 AD. L. REV. 147, 180 (1967); *see* Leventhal, *Nature and Scope of Judicial Review,* in C. CHRISTENSEN & R. MIDDLEKAUF, FEDERAL ADMINISTRATIVE LAW: PRACTICE AND PROCEDURE 293, 298 (1977).

193. *See* Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act,* 20 UCLA L. REV. 899, 933-34 (1973) (Consumer Product Safety Act makes the term " 'record' include that which in lawyerly and even common parlance would more precisely be described by the term 'non-record' ").

194. Choice of sanctions or remedies has been subjected to limited review, no matter what standard is applied to the primary decisionmaking process. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967); Wise v. United States, 603 F.2d 182, 191-92 (Ct. Cl. 1979). Nevertheless, there are limits. *See* National Nutritional Foods Ass'n v. FDA, 504 F.2d 761, 786 (2d Cir. 1974) (FDA regulations invalidated as unreasonable), *cert. denied,* 420 U.S. 946 (1975).

Increased variety in agency procedures, however, further decreases the utility of process analysis in determining the proper scope of review. The procedures of a particular agency program and the records produced must be considered together in determining the proper scope of judicial review. Examination of the procedures used by the agency alone is much too imprecise an approach to establish the proper scope of review. The inadequacies of the procedural approach have caused confusion as to the proper role of the judiciary in several administrative programs, and have forced courts to look for more precise tools for discovering the proper level of review.

2. Inadequacies in Defining the Judicial Role According to the Process

Despite the increasing understanding of the less traditional forms of records, courts have been very inflexible in developing a new understanding of their review responsibilities with respect to the new procedures. Even the best judges have questioned the utility of the present standards of review system when they are confronted with nontraditional records. Several judges have suggested that the informal or nonevidentiary nature of some administrative records virtually destroys the utility of distinguishing different standards of review.[195]

The traditional theory is that the proper standard for review of informal records should be arbitrariness[196] and that the substantial evidence test should be limited to formal records. There is some logic in this theory because, taken literally, the phrase "substantial evidence" review demands evidence and thereby contemplates a formal record.[197] Such review is logically impossible when an informal record contains no "evidence" and, hence, judges have had difficulty applying the standard to informal records. The difficulty has drawn some judges into ignoring the real, rather than semantic, differences among the standards; they do not see that the major function of the standards is to communicate the correct intensity of review, not to establish the type of information the court should demand.

The structure of the record, therefore, cannot be the major factor that defines the appropriate level of review. The evolution of a sound review system

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195. *E.g.*, Associated Indus. v. Department of Labor, 487 F.2d 342 (2d Cir. 1973):

> [W]hile we applied to F.C.C. rulemaking the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A), it is hard to see in what respect we would have treated the question differently if we had been applying a "substantial evidence" test. . . . While we still have a feeling that there may be cases where an adjudicative determination not supported by substantial evidence. . . would not be regarded as arbitrary or capricious,. . . in the review of rules of general applicability made after notice and comment rulemaking, the two criteria do tend to converge.

Id. at 349-50; *see* Scalia & Goodman, *supra* note 193, at 935 n.138.

196. *See* text accompanying note 173 *supra.*

197. 1 K. DAVIS, *supra* note 148, at 468.

demands the flexibility to apply various standards to test different processes and different information packages. The type of process which produces the record and the nature of the information package itself affects the way the reviewing court applies these standards, but they do not affect the judgment as to the proper intensity of review. The court must understand the limitations of the record created by each type of administrative process and apply the standard best suited to these limitations. Nonetheless, these review standards have meaning independent of the form of the administrative process or the record to which they are applied. It would be a substantial step backwards if courts abandoned the present law about review merely because judges sometimes feel uncomfortable with an agency record presented for review.

As we have seen, reasonableness review usually applies only to the results of formal proceedings.[198] Congress has in recent times, however, prescribed reasonableness review for both informal adjudication and informal rulemaking.[199] Courts cannot ignore these instructions simply because they are unaccustomed to carrying them out in the context of informal action. Nonetheless, courts often refuse to apply the mandated level of review, or they have imposed a record requirement not intended by Congress merely because they face inconsistent instruction.[200]

More agile judicial minds can accommodate reasonableness review of informal records.[201] Perhaps it is unfortunate that Congress chooses the term "substantial evidence" to communicate reasonableness review for informal decisions. Nevertheless, courts have shown that they can simply focus on the reasonableness element underlying the instruction and decide whether the agency's conclusions are reasonable based on the information package used by the agency in making the decision. These courts recognize that the substantial evidence standard is an effort by Congress to require a relatively high probability of correctness as opposed to the less probing arbitrariness review otherwise applied to informal records.[202] There appears to be no reason why a reviewing court cannot apply the reasonableness standard to informal records.

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198. MANUAL, *supra* note 3, at 109.

199. *E.g.*, 15 U.S.C. § 57a(e)(3) (1982) (Federal Trade Commission rulemaking); *id.* § 717r(b) (substantial evidence provision of the Natural Gas Act applies to informal rulemaking); 42 U.S.C. § 405(g) (1976) (informal adjudication by Social Security Administration). Nevertheless, the fact that an agency imposes formal procedures on rulemaking through its own procedural rules does not compel substantial evidence review. Automobile Club of N.Y., Inc. v. Cox, 592 F.2d 658, 664 (2d Cir. 1979); MANUAL, *supra* note 3, at 108-09.

200. *E.g.*, Association of Bank Travel Bureaus, Inc. v. Board of Governors of Fed. Reserve Sys., 568 F.2d 549, 552 & n.5 (7th Cir. 1978); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1258-60, 1262-63 (D.C. Cir. 1973).

201. *E.g.*, D.D. Bean & Sons v. CPSC, 574 F.2d 643 (1st Cir. 1978); Phillips Petroleum Co. v. FPC, 475 F.2d 842, 850-52 (10th Cir.), *cert. denied*, 414 U.S. 1146 (1973).

202. Aqua Slide 'n' Dive v. CPSC, 569 F.2d 831, 837 (5th Cir. 1978); *see* Wright, *supra* note 49, at 391-92.

For example, Judge Tamm, in a challenge to an FAA finding that a television antenna would not be a hazard to aviation, found that "the informal adjudication procedures employed by the FAA created a record which contains substantial evidence supporting the no-hazard decision."[203] The hazard determination procedures specifically excluded application of trial-type adversarial hearing procedures,[204] but the statute provided that "findings of fact by the [FAA], if supported by substantial evidence, shall be conclusive."[205] The FAA argued for the application of the "less rigorous arbitrary and capricious standard" because of the absence of a formal record.[206] Substantial evidence review, the FAA maintained, was inappropriate where the record for review lacked the internal integrity ensured by a quasi-judicial hearing process.[207] The court found, however, that it could undertake substantial evidence review of the informal record and thereby had no trouble finding that the FAA's conclusions were "reasonable and well supported in the record before us."[208] No matter what kind of record is presented for review, a court can determine whether the agency's factual conclusions are reasonable, provided that all of the information which the agency actually used is presented to the reviewing court.[209]

Any of the types of review can be applied to any form of administrative action. Certain types of review are more compatible with certain records. Such general compatibility provides some guide to the type of review required in a particular administrative program, but it is inadequate to provide the final answer. Conclusions about the level of review, then, must remain independent of the type of procedure or information package presented to the court.

B. *The Judicial Role According to the Type of Issue Under Review*

The nature of the process is an imprecise method for communicating or determining the appropriate type of review. No matter what kind of information package or what issues may be expected to dominate a particular type of proceeding, the result will be a combination of several types of issues. Effective review must approach each type of issue differently.

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203. Aircraft Owners & Pilots Ass'n v. FAA, 600 F.2d 965, 966 (D.C. Cir. 1979).

204. *Id.* at 970.

205. 49 U.S.C. § 1486(e) (1976).

206. 600 F.2d at 969.

207. *Id.* at 970.

208. *Id.* at 973.

209. Under the APA, substantial evidence review requires "whole record" review, but the whole record provision of § 706 applies to all the standards. Thus, reasonableness or arbitrariness review cannot be distinguished as to whether one or the other requires whole record review. The record may vary according to the formality of the proceeding, but it does not vary with the standard of review. Controversy over whether there is any real distinction, beyond the structure of the record, in the existing standards suggests that further breakdown in the degrees of judicial involvement would not be worthwhile.

In order to make the modern review system work, the conclusion about the level of review drawn from the type of agency proceeding must be refined according to the various types of issues which led to the decision. In finding its role, a court must look beyond the type of record and segregate the various issues involved in the decision. A reviewing court must be prepared to contribute differently to the resolution of issues of fact, policy, law, procedure, and constitutionality, and its review function must be broken down according to these categories.[210]

1. Facts

Factual conclusions are generally reviewed under either a reasonableness or arbitrariness standard.[211] Courts are rarely authorized to conduct *de novo* factfinding or to substitute judgment on questions of fact. The term "substantial evidence" is often used to communicate the reasonableness review instruction. The phrase "arbitrary, capricious or abuse of discretion" is used to communicate arbitrariness review. If the enabling act is silent, the APA requires reasonableness review only where the facts are found in a formal proceeding.[212] The presumption is that the intended standard for review of informal factfinding is arbitrariness.

Although the type of proceeding is traditionally used to determine the proper level of factual review, the court should look beyond the type of procedure and focus on the kind of facts under review. Review of adjudicative facts should differ from review of legislative facts.[213] Adjudicative facts, whether

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210. COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, ABA, FINAL DRAFT OF STANDARDS RELATING TO APPELLATE COURTS 98-100 (1977) ("The function of the courts in judicial review can be classified . . . by distinguishing the types of questions that may be involved."). The distinguishable issues identified in the Commission's report are law, policy, fact, and procedure.

211. *See* K. DAVIS, *supra* note 104, at 647.

212. 5 U.S.C. § 706(2)(E) (1982).

213. Professor Davis has defined the two as follows:

> When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how and with what motive or intent—[it] is performing an adjudicative function, and the facts are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively;. . . and the facts which inform the tribunal's legislative judgment are called legislative facts.
>
> . . . Legislative facts are ordinarily general and do not concern the immediate parties.

2 K. DAVIS, *supra* note 1, at 353. The most overlooked word in the this statement is "conveniently." This distinction is not proposed as suggesting hard line categories but as a convenient way to analyze what experience shows are two varieties of facts in each legally related decision. Some facts are clearly of a nature consistent with the adjudicative fact category and others with the legislative fact category. It is freely admitted there are facts which do not clearly fall into either. By using this distinction in answering scope of review questions, we can limit the argument by excluding the clear cases and concentrating on the cases at the margin.

developed in a formal or informal adjudication, should be subjected to the higher demand for accuracy embodied in reasonableness review. They are central to determinations of individual rights or duties, and hence take on a special importance. Adjudicative facts are facts that can be proven and thereby evaluated for correctness.[214] Nevertheless, reasonableness review does not mean that these facts necessarily must be proved through technical evidence. Both judicial and official notice permit the notice and comment approach to a vast amount of adjudicative facts which enter an administrative record,[215] and the summary judgment, or "modified procedure," approach to adjudication can lead to findings of adjudicative fact on written records.[216]

Adjudicative facts are not usually subjected to reasonableness review when they are found in an informal proceeding. The APA provides for reasonableness review only where such findings are made in section 556 and 557 proceedings.[217] Most enabling acts which set up informal adjudications do not provide for substantial evidence, or reasonableness, review.[218] Since the APA does not affirmatively deal with review of facts on informal records, courts might be free to evolve a doctrine which generally requires reasonableness review of adjudicative facts without regard to the type of process, unless specifically precluded by statute, legislative intent, or the needs of the administrative scheme.

Legislative facts,[219] on the other hand, should generally be subjected to arbitrariness review. They are not facts that can be "proved" in the traditional sense, and they cannot be reviewed in the same manner as provable facts.[220] Conclusions about legislative facts by their nature cannot stand up to a test for a high probability of correctness. Moreover, legislative facts usually involve questions in which the agency's judgment deserves a stronger presumption of regularity.[221]

Review instructions, however, do not separate the two types of facts. The APA requires reasonableness review for all facts found in a formal proceeding,

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214. *Id.*

215. *See* FED. R. EVID. 201.

216. *See* IV SENATE COMM. ON GOVERNMENT AFFAIRS, 95TH CONG. 1ST SESS., STUDY ON FEDERAL REGULATION 57 (1977).

217. 5 U.S.C. § 706(2)(E) (1982).

218. *But see* MANUAL, *supra* note 3, at 109: "It will be noted that this codified substantial evidence rule is made applicable not only to cases governed by . . . [§§ 556-557], but also to those types of cases in which statutes provide for agency hearings, but which are exempted from . . . [§§ 556-557] by the introductory clause of . . . [§ 554]."

219. *See* note 213 *supra.*

220. *See* AFL-CIO v. Marshall, 617 F.2d 636, 650-51 (D.C. Cir. 1979), *vacated and remanded,* 449 U.S. 809 (1980); Davis, *Facts in Lawmaking,* 80 COLUM. L. REV. 931, 938 (1980).

221. *See* Wald, *Making "Informed" Decisions in the District of Columbia Circuit,* 50 GEO. WASH. L. REV. 135, 153 (1982) (the difficulty of review of legislative facts, *e.g.,* scientific or technical facts, might be overcome by more judicial factfinding).

and most enabling acts follow the same pattern. Obedient courts might try to apply reasonableness review to both adjudicative and legislative facts, but some courts do seem as a practical matter to review legislative facts differently.[222] A better review system might give them more freedom to do so.

Although courts are usually told to review facts under either a reasonableness or arbitrariness standard, they sometimes may be instructed to do agreement or *de novo* review of facts. Under such instructions, a court becomes the ultimate factfinder because it can substitute its judgment for that of the agency.[223] Agreement review of facts is disfavored in the administrative process.[224] Agreement review to some extent requires the courts to duplicate factfinding performed by the agency. If the courts are better factfinders in a given context, then they should be assigned to the task in the first instance. If the agency is assigned factfinding, then the courts should not redo the agency's work.

Because agreement review of facts usually misallocates judicial resources, it should be undertaken only when the legislature clearly demands it. Both the Constitution and common law, however, sometimes require agreement or *de novo* review of facts. Thus, if such review is not provided for in the statute, or even if Congress attempts to provide for less review, persons challenging certain agency action can insist under this authority on *de novo* judicial consideration as a matter of constitutional right.

In a 1920 opinion, *Ohio Valley Water Co. v. Ben Avon Borough*,[225] the Supreme Court found a right to *de novo* review for cases involving "constitutional facts." The Court held that when someone in a ratemaking proceeding

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222. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) (FCC's judgment on "public interest" entitled to substantial judicial deference); AFL-CIO v. Marshall, 617 F.2d 636, 648-52 (D.C. Cir. 1979) (even where substantial evidence review is authorized, the court should do less rigorous review of general or policy oriented facts), *vacated and remanded*, 449 U.S. 809 (1980); EDF v. EPA, 598 F.2d 62, 83-85 (D.C. Cir. 1978) (reviewing courts should give less scrutiny to agency influences from available data and existing knowledge); Bradford Nat'l Clearing Corp. v. SEC, 590 F.2d 1085, 1104 (D.C. Cir. 1978) (even where substantial evidence review is authorized, "a wide range of conclusions [as to "future-oriented facts"] will inevitably lie within the range of reasonable nonarbitrary choice"); Amoco Oil Co. v. EPA, 501 F.2d 722, 741 (D.C. Cir. 1974) ("Where . . . the regulations turn on choices of policy, on an assessment of risks, or on predictions dealing with matters on the frontiers of scientific knowledge, we will demand adequate reasons and explanations but not 'findings' of the sort familiar from the world of adjudication.").

223. Courts reviewing administrative decisions are not generally authorized to substitute judgment on issues of fact and policy. *See* ASARCO, Inc. v. EPA, 616 F.2d 1153, 1159-60 (9th Cir. 1980); L. JAFFE, *supra* note 13, at 620-21; M. REDISH, *supra* note 107, at 35, 45. As Professor Jaffe has suggested, the difference here might be that the court will not exercise discretion which should be given the agency, MANUAL, *supra* note 3, at 108, but it can express judgments which otherwise might have been given to an agency. The difference is discussed in section III *infra*.

224. Consolo v. FMC, 383 U.S. 607, 619 n.17 (1966); United States v. Carlo Bianchi & Co. 373 U.S. 709, 715 (1963); MANUAL, *supra* note 3, at 109-10.

225. 253 U.S. 287 (1920).

"claims [a] confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause. . . ."[220]

Sixteen years later, in *St. Joseph Stock Yards Co. v. United States,*[227] the Court expanded on the sketchy reasoning in *Ben Avon.* The Court viewed ratemaking as a legislative function for which there was generally very limited review. When the legislature delegated the power to set utility rates, it conferred on the agency powers the legislature could exercise and thereby empowered the agency to act as its agent with the same limited degree of judicial supervision. Because the agency was acting in the place of legislature, review was by necessity limited to review similar to that of legislative action. "But the Constitution fixes limits to the ratemaking power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation."[228] Because the courts are always the final arbiters of constitutional questions, the Court found that review of facts contributing to the resolution of constitutional questions cannot be limited: "Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."[229] The Court noted that even in this review a court should not ignore the administrative record or reasoning, and that a court should only interfere in the administrative judgment where the complaining party meets its burden of "making a convincing showing."[230]

A second line of early cases established constitutional right to *de novo* review for "jurisdictional facts." Justice Brandeis, in *Ng Fung Ho v. White,*[231] found that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."[232] Questions of "jurisdictional facts" were thereby opened to *de novo* review. Because it found citizenship so fundamental, the Court in *Ng Fung Ho* required the entire case to be retried by the reviewing court, whereas *Ben Avon* and *St. Joseph* only expanded the scope of judicial review to allow the court to make an independent judgment on issues of "constitutional facts." Another classic case, *Crowell v. Benson,*[233] carried the jurisdictional fact rationale beyond the sensitive area of deportation and loss of citizenship. The longshoremen workers' compensation legislation required that the injury occur within the course of employment on navigable

226. *Id.* at 289.
227. 298 U.S. 38 (1936).
228. *Id.* at 51.
229. *Id.* at 51-52; *see* Connick v. Myers, 103 S. Ct. 1684, 1690 & n.10 (1983).
230. 298 U.S. at 53.
231. 259 U.S. 276 (1922).
232. *Id.* at 284.
233. 285 U.S. 22 (1932).

waters. The Court held these elements to be jurisdictional facts which required the case to be retried by reviewing courts.[234]

Both the "constitutional fact" and the "jurisdictional fact" notions, however, generated adverse comment. There was particular concern that the judicial branch was injecting itself too much into the administrative process. Consequently, except for the citizenship area carved out by *Ng Fung Ho,* constitutionally mandated *de novo* review has virtually disappeared in federal administrative litigation and rarely finds acceptance in state courts.[235]

In *Overton Park,* the Supreme Court established the basic formula for the nonconstitutional inference of *de novo* review authority:

> *De novo* review of whether the Secretary's decision was "unwarranted by the facts" is authorized by § 706 (2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.
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> . . . Neither situation exists here.[236]

This language should not be read too literally. It cannot mean that *de novo* judicial consideration is required in every case where the "agency factfinding procedures are inadequate" because that would compel *de novo* review in numerous administrative proceedings. The adequacy of the procedures is one of the most prevalent reasons for rejecting agency action. It must mean that judicial factfinding will be required wherever the agency does not have the authority to establish adequate factfinding procedures. Where the court finds that the agency factfinding is inadequate but that the agency has the procedural authority to correct the inadequacy, then the court's proper function is to return the matter to the agency with instructions as to how to correct the inadequacy. Only where such a demand would involve the agency in a procedure which it is not authorized to perform should the court undertake the necessary *de novo* proceeding. This is consistent with the second circumstance in which factual questions arise in the "nonadjudicatory" proceeding where such a nonadjudicative process could not deal with the facts. The *Overton Park* decision would have a court provide its own adjudicative process as the only alternative. Neither circumstance happens very often.

Except in these rare circumstances, the assignment to undertake *de novo* review should come from legislation. Several specific statutes do in fact require *de novo* review.[237] Experience indicates that there should be no across-the-

234. *Id.* at 60-64.

235. B. SCHWARTZ, *supra* note 35, § 224. One other area in which *de novo* review may be required is in obscenity, where film review boards decisions must undergo a "final judicial determination." Freedman v. Maryland, 380 U.S. 51, 59 (1965); *see* F. SCHAUER, THE LAW OF OBSCENITY 151-53 (1976).

236. 401 U.S. at 415.

237. *See* Chandler v. Roudebush, 425 U.S. 840, 861-62 (1976).

board provision for *de novo* review of facts.[238] Rather, review of factfinding should be and usually is either reasonableness or arbitrariness review.[239]

2. Policy

Administrative process grew out of the desire to develop a mechanism for effective policymaking.[240] It flourished because agencies could be designed for the special purpose of making policy in a particular area. Thus, the very existence of jurisdiction of an agency in a particular area suggests a conscious choice to confer policymaking power upon it and not the courts. In order to protect this choice, the law admonishes courts to restrain themselves when faced with policy issues.[241] A court with an urge to make policy in the place of the agency violates longstanding doctrine.[242]

Therefore, the courts have less responsibility with respect to administrative policy than with any other issue. As Judge McGowan concluded:

> What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive.[243]

Policy judgments by their very nature are not decisions that can be made with great confidence of correctness.[244] Review of policy judgments must allow for

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238. *See* Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action,* 31 AD. L. REV. 329 (1979). *But see* Discussion, *supra* note 7 (R. Neustadt), *reprinted in* 32 AD. L. REV. at 303 (pointing out certain advantages to statutorily directed judicial review).

239. *De novo* review also differs from the other standards of review in the remedy available if the court finds against the agency. Unlike the other standards, a court doing *de novo* review of a particular issue can substitute its conclusion for that of the agency, whereas under the other standards, the court must return the decision to the agency for the agency to rectify the deficiencies.

240. *See* L. JAFFE, *supra* note 13, at 612-13.

241. Elizabethtown Gas Co. v. FERC, 575 F.2d 885, 888 n.2 (D.C. Cir. 1978); Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967).

242. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.").

243. Industrial Union Dep't v. Hodgson, 499 F.2d 467, 475-76 (D.C. Cir. 1974); *see* Hercules, Inc. v. EPA, 598 F.2d 91, 106 (D.C. Cir. 1978); Environmental Defense Fund, Inc. v. EPA, 598 F.2d 62, 82, 90 (D.C. Cir. 1978).

244. Bradford Nat'l Clearing Corp. v. SEC, 590 F.2d 1085, 1110-11 (D.C. Cir. 1978).

a good deal of leeway. The hope for correctness lies in the design of the agency's policymaking process, and courts must avoid interfering with the workings of that process.

On the other hand, even though policy is the special providence of the agencies, courts are not totally excluded, and policy judgments are rarely made unreviewable. Consequently, since the courts should monitor policy judgments but should tolerate a high risk of error, the correct standard is usually arbitrariness.

Of course many policy decisions do not involve judgments that can be weighed against the probability of correctness. Rather, they often involve the exercise of pure discretion. Policy is the area where true discretion is most likely to be granted, and such discretion necessarily precludes the court from evaluating the agency decision. Where the court finds that the policy decision is the result of the exercise of pure discretion it should not review the decision except to look for those external factors which make up abuse of discretion review.[245]

In their efforts to avoid usurping administrative policymaking functions, courts must analyze every administrative decision under review to separate out the policymaking portion. They must not allow commingling of policy with other issues to lead them into overstepping their function. After a court has identified which elements of a decision involve policymaking, it must assure that it reviews for arbitrariness. Where the policy of choice involves true discretion, the court may not review the actual decision. Even common law grants of discretion, such as prosecutorial discretion, allocate to the agency policymaking-type discretion. That is why those decisions are traditionally held to be unreviewable.

In short, review of policymaking requires meticulous attention to avoid the kind of judicial interference likely to injure the policymaking machinery. The law firmly establishes that the courts themselves cannot choose to increase their own involvement in policymaking; that area, more than any other, is left to the agencies.[246]

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245. *See* section II *supra.*

246. The Supreme Court's treatment of the agency's cost/benefit analysis may ultimately be the most significant aspect of Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856 (1983), even though its use of the arbitrariness standard will have the most immediate impact. *See* text accompanying notes 71-76 *supra.* In this case, the Secretary of Transportation rescinded a rule which would have required passive restraints in automobiles. He found that the predicted benefits no longer outweighed the predicted costs. The Court probably went further in reviewing a cost/benefit judgment than it ever had before. Although recognizing that a cost/benefit analysis affecting a policy decision must be tested for arbitrariness only, the Court nonetheless rejected the Secretary's analysis in this instance. *Id.* at 2865. As to one issue, it found that a prior judgment that the benefits outweighed the costs had not been sufficiently explained away. On another issue, it actually disagreed with the agency's conclusions and found that the agency had not demonstrated a reasonable evaluation of either the costs or the benefits. This finding contributed to the Court's

Despite a general theory prohibiting substantial judicial involvement in administrative policymaking decisions, Congress can assign higher levels of review when it finds that involvement consistent with the particular administrative scheme. Arbitrariness may be more appropriate in a conceptual sense, but in a specific process a different level may be chosen. For example, Congress may ask the court to review agency policy judgments for reasonableness and not just arbitrariness. It may decide that discretionary decisions should not involve the exercise of administrative discretion alone but should include some element of judicial discretion. It may even choose redundant evaluation by the courts by asking the court to substitute policy judgment where it disagrees with the agency. But it is Congress, not the courts, which must choose to increase judicial involvement in policymaking.

Congress has indirectly raised the standards of review in policymaking in recent years by requiring that policy judgments be supported by cost/benefit analysis.[247] Cost/benefit requirements force the agency to determine whether there is a preponderance of benefit in its policy decisions. If regulatory reform continues to add this requirement to various administrative schemes, agencies, and perhaps ultimately reviewing courts will have to decide whether the costs are justified by greater benefits.[248] This analysis, in a sense, expresses the slippery "public interest" criteria as a function of attempts at concrete measurement of identifiable costs and benefits in an agency action. In reality it is no more than a decisional tool whereby public policy choices are taken apart and all the elements are separated and given some concrete value.[249] After as many elements as feasible are given some concrete and uniform unit of value, they can be compared so as to search for a preponderance of benefit. Although these values are often imprecise, they force a comparison of public interest which is often otherwise finessed. It requires the policymaker to find the weight of the identifiable, though often intangible, benefits in favor of a given policy, and requires "proof" of the correctness of the policy by a preponderance of identified benefits.

The incorporation of cost/benefit analysis into an administrative program

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conclusion that the agency action was arbitrary. *Id.* at 2868.

247. *E.g.,* Regulatory Flexibility Act, 5 U.S.C. §§ 603-604 (1982); Executive Order 12,291, § 2(b), 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 note at 432 (1982); ("Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;. . ."); *see* Neustadt, *The Administration's Regulatory Reform Program: An Overview,* 32 AD. L. REV. 129, 137-42 (1980).

248. American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 506-22 (1981); Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 652-59 (1980).

249. For a very concise treatment of cost/benefit analysis, see L. ANDERSON & R. SETTLE, BENEFIT-COST ANALYSIS: A PRACTICAL GUIDE (1977). There are two basic schools—those who call it cost/benefit analysis and those who call it benefit/cost analysis. I tend towards the former and you can draw your own psychological conclusions from that.

raises new problems for the review system. The judicial function with respect to cost/benefit analysis is unclear and still emerging. Courts could be limited to assuring that the cost/benefit analysis was conducted correctly, or they could be given some role in evaluating the results of the analysis.[250] Whatever role ultimately emerges, courts must take care not to assume too much authority too quickly. The balancing inherent in cost/benefit analysis should remain with the decisionmaker assigned the task until clear evidence indicates a need to monitor that decisionmaker. Moreover, the results of the cost/benefit analysis contribute to the ultimate decision, but they do not, in and of themselves, constitute the ultimate decision. Many variables, such as morality, democratic principles, and economic equality, can also contribute to the decision. Generally speaking, courts should not get involved in these kinds of considerations, and they should not let the apparent objectivity of the cost/benefit analysis device draw them into those arenas. The courts at this point should show the same restraint in reviewing policy decisions supported by cost/benefit analysis that they show toward any policy decision.[251]

3. Law

Issues of law stand at the extreme opposite from issues of policy; the judiciary is the final arbiter of questions of law, and courts are free to substitute their judgment on any such questions.[252] The court's job in reviewing questions

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250. Even if the benefit/cost analysis is not reviewable, courts will not ignore it. *See* Discussion, *supra* note 7 (Hon. H. Leventhal), *reprinted in* 32 AD. L. REV. at 293. Courts are already required to consider whether the benefits of a procedural element will outweigh the costs of imposing additional procedures. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

251. *See* Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2871 (1983).

252. SEC v. Sloan, 436 U.S. 103, 118-19 (1978); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); *see* 5 U.S.C. § 706 (1982) ("reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions").

The APA specifically authorizes review of questions of law. Section 702(2)(A) permits rejection of agency action "not in accordance with law" and § 706(2)(C) permits rejection of agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." There does not seem to be any practical difference in the two instructions. One could authorize review of compliance with "law" which includes statutory and common law, and the other merely review of statutory authority. If so, does the first's position in the section mean that the drafters intended the degree of review commensurate with arbitrariness for violations of law? That interpretation seems unlikely. The second may merely establish separate review of jurisdictional type issues but, if so, it is redundant because agency action in excess of jurisdiction or authority would not be in accordance with law. Perhaps the "not in accordance with law" phrase should be separated from arbitrary, capricious and abuse of discretion. It might have its own subsection with language to make clear that it includes excess of jurisdiction and statutory authority.

On the other hand, the law is very well established that assertions of jurisdiction by agencies are given great deference and can only be questioned at the end of the administrative process. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507-09

of law is to find the right answer and correct the agency if it is mistaken. Even when a court decides that an issue is one of law, however, it still may give deference to the agency's view of the law.[253] The agency is, after all, intimately familiar with the circumstances surrounding the law, and its view on the law is not useless.[254]

A court may expand or contract its authority according to the way it defines the questions presented. The classic example is *NLRB v. Hearst Publications, Inc.*[255] The issue there was whether newsboys were "employees" under the National Labor Relations Act. The majority found that the question was not one of law for it to decide: "[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the staute must determine it initially, the reviewing court's function is limited."[256] The dissent, however, found the same question to be one of law: "The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question."[257]

As in the *Hearst* case, the definitional decision can completely change the outcome on close questions of law and fact.[258] A reviewing court should find its review function by carefully defining the issue involved and should resist result-oriented issue definitions.[259] The disagreement in *Hearst* appears to be

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(1943); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214 (1946). Since the jurisdiction cannot be questioned until the final decision, coverage is rarely an important issue on judicial review. Efforts to prevent agency action where jurisdiction does not exist have been futile.

253. *Compare* Power Reactor Dev. Co. v. International Union of Electrical Workers, 367 U.S. 396, 408 (1961) (deference paid to agency interpretation of regulation) *with* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979) (agency's interpretation of statute may be contradicted by language, purpose, and history of law).

254. Indeed, in Monsanto Co. v. Kennedy, 613 F.2d 947, 955-56 (D.C. Cir. 1979), the court admonished the FDA not to treat the statute too literally and to exercise its own powers of interpretation more affirmatively. *See* B. SCHWARTZ & H. WADE, *supra* note 4, at 70 ("The moral of this story is that the legal mind is often more liberal in interpreting statutes than is the official mind. The official instinct is to keep well within legal powers and to allow a generous margin for the uncertainty of the law.").

255. 322 U.S. 111 (1944).

256. *Id.* at 131.

257. *Id.* at 136 (Roberts, J., dissenting).

258. Professor Davis found that the Supreme Court takes two approaches to distinguishing law and fact: one literal and the other pragmatic. 4 K. DAVIS, *supra* note 1, § 30.02. Administrative law theory has massaged the law/fact distinction for generations. *See, e.g.*, W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 8, at 307-11. The same problem arises in other administrative law systems. B. SCHWARTZ & H. WADE, *supra* note 4, at 159-60.

259. Even the best judges seem to decide the law/policy or the law/fact question at the margin according to their determination of how the decisionmaking responsibility should be divided. *E.g.*, United States v. J.B. Williams Co., 498 F.2d 414, 430-31 (2d Cir. 1974).

an honest conflict over the nature of the relevant issue. Characterizing an issue is difficult, and such disagreements are inevitable. Careful attention to the type of issue under review, however, is a prerequisite to a successful review system. It is crucial that the court derive its review function from an honest definition of terms, and not by the amount of review it wants to do, because the definitions make the court's review compatible with the entire review system. A reviewing court must see that the review system in an administrative program assigns functions to it that will make optimum use of its special abilities, just as the program assigns the optimum role to the agency. A program does so with more precision if it assigns roles according to types of issues. If the program does not do so expressly, a court might refine the review instruction in a way that will define its role as to types of issues so as to best serve the administrative program. A reviewing court cannot stray into *ad hoc* determinations which ignore the law and the vast experience that make up the judicial review system.

One of the best judicial efforts to define a court's review responsibility according to the various categories of issues is Judge McGowan's opinion in *WNCN Listeners Guild v. FCC.*[260] The court took care to determine whether the relevant issues were ones of fact, policy, or law. The case involved the FCC's efforts to join the stampede towards deregulation. In a prior case, *WEFM v. FCC,*[261] the court held that the FCC should hold a hearing when there was a protest of a radio broadcaster's efforts to abandon a distinctive programming format. After rulemaking, the FCC issued a policy statement disagreeing with *WEFM* and argued that the public interest in diversity of entertainment format would be better served by unregulated competition. The FCC maintained that its policy judgment should take precedence over the court's and that its policy should not be reversed by the court. The court agreed that it had "neither the experience nor the constitutional authority to make 'policy' as that word is commonly understood. . . . That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission. But in matters of interpreting the 'law' the final say is constitutionally committed to the judiciary."[262] While recognizing that the "distinction between law and policy is never clearcut," it found that resolution of this controversy involved an interpretation of the Communications Act "in which the judicial word is final."[263]

The court next dealt with the controversy in terms of the possible disagreement over factual conclusions. "To the extent that the Commission was not questioning this court's legal judgment, but was attempting to demonstrate that faulty factual premises underlay that judgment, we agree that it was within its competence as an agency better equipped to develop legislative-type

260. 610 F.2d 838 (D.C. Cir. 1979), *rev'd,* 450 U.S. 582 (1981).
261. 506 F.2d 246, 259-60 (D.C. Cir. 1974) (en banc).
262. 610 F.2d at 854-55.
263. *Id.* at 855.

facts than is this court."[264] It found, however, that the factfinding in support of the policy statement was inadequate and did not contradict the court's legal judgment. The opinion is instructive in the meticulous way the court identified and applied its different roles with respect to the different categories of issues. It felt free to interpret the law, but, without ignoring the agency, it felt that it could not disagree with the agency if the issues were ones of policy. It felt constrained by the agency's factual judgment, but free to reject arbitrary factfinding.

In reversing the *WNCN Listener's Guild* decision, the Supreme Court found that the decision to permit the market to decide on program format was a question of policy and not of law.[265] Thus, it found that the judicial function was extremely limited because the question was left to the "broad discretion" of the FCC. It said that since the appellate court had conceded "that it possessed neither the expertise nor the authority to make policy decisions in this area," it should have permitted the agency to carry out the function for which it was designed. "[W]e recognized [in *FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 814 (1978)] that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. . . . These predictions are within the institutional competence of the Commission. Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference."[266] Although the Court used "deference" language, it meant that if a judgment relates to policy the reviewing court may not substitute its judgment but may only perform a very limited monitoring function, *i.e.,* arbitrariness review.[267]

These two opinions demonstrate that the correct application of the distinction between legal questions and policy questions has even more impact than the distinction between law and fact. Even though the Supreme Court disagreed with Judge McGowan's conclusion, it analyzed the question with the same issue-designation analysis. The two opinions offer a framework for analyzing the judicial function according to the issues at stake. In doing so, they also show the potency of this approach and its contribution to a sound review system.

4. Procedural Issues

Procedural issues are just one type of legal issue, and hence a court is always free to substitute its judgment on procedure. Courts sometimes talk, however, as if the agency's decisions on procedures are binding.[268] They view

264. *Id.*
265. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981).
266. *Id.* at 594-96. The Court required the same judicial restraint when reviewing the agency's choice between competing policies.
267. *Id.* at 602.
268. FCC v. Schreiber, 381 U.S. 279, 290 (1965).

procedural questions as within the sound discretion of the agency, and they perceive their review function as very limited. Adequate procedure, however, is a legal judgment and must be guaranteed by the courts. Therefore, while a court should give the agency's judgment substantial deference on the agency's own procedure, and agency procedural judgments should carry a strong presumption of regularity,[269] the court should uphold the agency only if it agrees with the agency.

Review of procedures, which is required by the APA,[270] produces inconsistent theory and ironic results. Sometimes the judiciary assumes a very active role in procedural development, while at other times it is extremely reticent. Procedural due process cases have authorized the courts to completely replace the agency's procedural judgment. On the other hand, in the major case defining the judicial role in creating procedures, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,*[271] the Supreme Court virtually removed the courts from making procedural decisions with language that might be construed to apply to all review of all administrative processes.

Vermont Yankee involved judicial authority to add procedures to informal rulemaking in order to impose "hybrid" rulemaking. After a hearing, the AEC granted the petitioners a license to operate a nuclear power plant. The AEC subsequently instituted rulemaking proceedings to deal with the question of considering environmental effects and eventually issued a rule relevant to nuclear fuel cycles. Respondents appealed the fuel cycle rule and the decision to grant a license. The District of Columbia Circuit held that basic notice and comment rulemaking was inadequate.[272] The Supreme Court reversed. It held that courts are not authorized to impose procedures in addition to those prescribed by the APA. The opinion contains language which severely restricts judicial authority to develop administrative procedures.[273] This language, however, does not contradict the notion that the reviewing courts can substitute judgment on procedural questions. The opinion does not suggest that procedural questions are not open to judicial pronouncement, but it does demand that procedural review stay within the law. It only makes the self-evident finding that courts, although free to substitute judgment on questions of law, including procedural law, are not free to misapply the law. The lower court in *Vermont Yankee,* the Supreme Court found, misinterpreted the law. Section 553 rulemaking procedure is not a procedural minimum, it said, but the full

269. Mathews v. Eldridge, 424 U.S. 319, 349 (1976) ("In assessing what process is due . . ., substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.").

270. 5 U.S.C. § 706(2)(D) (1982).

271. 435 U.S. 519 (1978).

272. 547 F.2d at 653.

273. 435 U.S. at 543-48.

procedural requirement under the law.[274] Thus, it found the lower court mistaken as to law—not that the lower court was bound by the agency's procedural judgments.

The Supreme Court's decision in *Steadman v. SEC*[275] reinforces this view. *Steadman* involved the standard of proof in fraud cases brought in SEC administrative proceedings. The Court read the APA as mandating a preponderance of the evidence standard, and held that the lower court was wrong in imposing a higher standard of proof. The Court said, however, that had there been no congressionally created standard, the court would have been free to impose whatever standard it felt was fair, and the lower court, therefore, would have been free to substitute judgment on this procedural question.

Although courts are free to interpret and establish procedural law for agencies, they are very reluctant to overturn the agencies' procedural judgments. They have so consistently given substantial deference to the agencies on some types of procedural questions that courts feel somewhat constrained in reviewing those questions.

In general, courts will not interfere with an agency's procedural judgments when the agency has made a conscious choice as to which of several established procedures would be best in a particular context. On such procedural questions, a reviewing court is harnessed by well-established law. This law severely restricts a court, for example, from interfering with the choice between rulemaking or adjudication.[276] Furthermore, the Supreme Court and many commentators have attempted to curb the judicial instinct to engage in nice judgments on procedural questions.[277] A doctrine of substantial restraint has evolved from these attempts in many areas of procedure.

On the other hand, courts are not restrained by procedural judgments on some procedural questions. Courts will, for example, always intervene to ensure that the agency followed its own procedural rules or procedures established by Congress.[278] In addition, when neither Congress nor the agency has established adequate procedures, courts will be compelled to demand adequate procedures. Thus, where the challenge is to the adequacy of the opportunity to be heard in a particular context, the courts can be expected to give the question very thorough review. For example, courts have taken a very active part

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274. 435 U.S. at 545.

275. 450 U.S. 91 (1981).

276. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (choice of adjudication over rulemaking); United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956) (choice of rulemaking over adjudication).

277. Wright, *supra* note 49, at 387-88. One concrete example of the problem was noted in Yaretsky v. Blum, 629 F.2d 817, 823-24 (2nd Cir. 1980), *rev'd*, 457 U.S. 991 (1982). Indeed, agencies themselves are most apt to have too much procedure rather than too little, and private attorneys general would perform a great public service by bringing cases against agencies which provide too much procedure.

278. The best judicial effort to distinguish procedural rules from substantive rules is Pickus v. United States Bd. of Parole, 507 F.2d 1007 (D.C. Cir. 1974).

in developing procedures for informal adjudication. As Judge Bazelon has observed, judges are experts in, above all else, procedures, and hence they can contribute more to procedural development than to any other area of an administrative program.[279] Thus, while there is need for restraint and comity, both doctrine and practicality demand that courts retain the authority to substitute their procedural judgments for that of the agencies.

The depth of judicial scrutiny of procedural judgments, and the ability to substitute judgment on such issues, raises a further caution. Judge Friendly has pointed out that procedural review and substantive review are intertwined.[280] There may be little difference, for example, between a court sending a matter back to the agency because of some procedural defect that resulted in inadequate support and sending it back because of the absence of substantial evidence. Under any standard of review, the adequacy of support depends on the machinery used to develop that support. In many cases, when a court finds the machinery inadequate it has also made some judgment about the substantive conclusions. The merging of substantive and procedural review is inevitable, but a sound review system demands that the courts keep the two types of review separate to the extent possible. A court should avoid reaching conclusions about procedure when it really disagrees with the substantive judgments. This results in distortions in the development of procedural law and it presents the danger that the courts will interfere in the substantive decision more than was intended. The court is largely free to substitute judgment on procedural questions, but it is almost always limited in review of substantive questions. The system demands that the court apply the proper level of review to each issue and suffers from an effort to expand the review by confusing the two. On the other hand, the system needs extensive judicial contribution on procedural questions, and it suffers when the court incorrectly restrains itself on those issues.

5. Constitutional Issues

The APA provides for review of constitutional issues involved in agency action.[281] Constitutional review of agency action is an essential part of the review system developed in this paper. There is some confusion generated, however, by the failure to determine whether the court is reviewing the constitutionality of congressional action or agency action. Review of underlying statutes which are represented by agency action is properly very limited,[282] but as

279. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973) (Bazelon, J., concurring).

280. Friendly, *supra* note 93, at 1313. With the agencies often trying to beat the overly active courts to the punch, it is little wonder that we have created procedures that are so expansive and unworkable that they may lead to the demise of many substantive functions because the benefits have been swallowed up by the drain on resources into procedures.

281. 5 U.S.C. § 706(2)(B) (1982).

282. Such review is limited because review of legislation *per se* is limited. *See*

agency action moves away from a simple manifestation of legislative direction towards acting on its own, the constraints on review also lessen. At the point where the constitutionality of the agency action can be said to be divorced from the constitutionality of its statutory support, the judicial authority becomes absolute. At that point, the court is the final arbiter of all constitutional questions and is free to substitute judgment. Indeed, unlike questions of law, a court probably need not even give deference to any agency constitutional determination.[283]

Although courts give little deference to agency constitutional judgments, two basic categories of constitutional challenges to agency action are generally subject to very slight judicial review. The first, due process, as discussed above, often fails to involve the courts in the procedural judgments of the agency, and some procedural challenges do not receive much support. The second, the nondelegation doctrine, also tends to raise little judicial support.[284] Although some delegations of legislative authority have been struck down in the past,[285] and some may be successfully attacked in the future,[286] most delegations will pass judicial examination. Courts are presently inclined to approve almost any delegation.[287] To some extent this extreme judicial deference to delegations can be explained by the fact that review to prevent improper delegation actually questions congressional action rather than administrative action; thus, review of delegation is properly very limited.

6. Overview of Issue-directed Standards

Each administrative decision will involve a mix of different categories of issues, and each category involved in that decision may be subjected to different standards of review. A court is free to substitute judgment on issues of constitutionality, procedure, and law. The level of judicial scrutiny on these issues will depend on the deference afforded the administrative judgment, and

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generally Bice, *Rationality Analysis in Constitutional Law,* 65 MINN. L. REV. 1 (1980).

283. *Cf.* Blount v. Rizzi, 400 U.S. 410, 419-20 (1971); Freedman v. Maryland, 380 U.S. 51, 58 (1965); Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter,* 64 VA. L. REV. 263, 299 (1978).

284. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 (1892). "Although, as we shall see in ensuing sections, delegations are often sustained in absence of statutory statement of standards, the pivot on which judicial opinions usually hinge is presence or absence of a legislative standard." 1 K. DAVIS, *supra* note 1, at 81.

285. L. JAFFE, *supra* note 13, at 57-72.

286. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring).

287. *See, e.g.,* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971). If review of delegations were converted into review of agency inaction through the concept of "required rulemaking" as proposed in K. DAVIS, *supra* note 91, at 56-57, then review could be much more searching.

many factors affect that deference.[288] The courts are rarely authorized to substitute judgment on issues of policy or fact, and the level of review on such issues is not a question of deference. Questions of policy are usually assigned to the agency's judgment or discretion, and courts can inject themselves only so far as to ensure against arbitrariness or to guard against abuse of discretion. Questions of fact may be open to several levels of review, usually either reasonableness or arbitrariness, and a court must stay within the assigned level. When the assignment is not clear, a court can determine whether to apply the reasonableness or the arbitrariness standard according to whether the factual issue involves adjudicative facts or legislative facts.

IV. CONCLUSION

Reviewing courts are as responsible as the agencies for the success of the administrative process in general and each administrative program in particular. The judiciary shares the duty to assure that a program provides the maximum aggregate benefit to all intended recipients of that program and that the entire governmental system works to the maximum benefit for all citizens. The reviewing courts, however, are not well situtated to answer this duty. Their review function is inherently myopic; it forces courts to focus on only isolated and usually unrepresentative situations within the total administrative program.

Courts deal with this myopia in several ways. Some try to become instant experts so that they can take a broader view than that presented by the individual case before them.[289] Others replace legislative and administrative judgments with their own dogmas and biases.[290] The better judges make the best decisions they can in the case before them and concede that they cannot make overreaching judgments in the context of individual cases.

The review system serves this last group and permits them to serve the public interest. Through the principles surrounding standards of review and unreviewability, the system instructs these judges as to how to approach the individual case in a way commensurate with the overall administrative program and best calculated to provide optimum government benefits to the objects of the program and the public as a whole. Through these principles, those with the responsibility for establishing a coherent program, the legislature, can assign to the courts their place in the program.

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288. These include the elements which make an agency's judgment persuasive: thoroughness of consideration, validity of the reasoning, consistency with prior and subsequent pronouncements, agency specialization, legislative reenactment, contemporaneous construction of a statute, and longstanding effectiveness.

289. *E.g.*, Wald, *supra* note 221, at 153.

290. *E.g.*, Natural Resources Defense Council v. NRC, 685 F.2d 459, 517 (D.C. Cir. 1982) (Wilkey, J., dissenting) ("If there was ever a doubt prior to today, it is now clear that this court is committed to an assumed role as high public protector of all that is good from perceived evils of the nuclear age."), *rev'd*, 103 S. Ct. 2246 (1983).

I have tried to express the structure and rationality of the review concepts the system uses. If this description succeeds, it will enable Congress to better instruct the courts and it will guide the courts in finding their role where the instructions are not clear or as precise as they should be. All this is approached from the point of view of allowing the courts and the agencies to take advantage of each other's strength, thereby providing the best possible service to the public.